

Transcript of the Testimony of

30(b)(6) of WESTFAX, INC., BARRY CLARK
April 20, 2017

Comprehensive Health Care Systems

vs.

M3 USA Corporation, et al.

Doreen Girdeen, RMR

Doreen Girdeen, RMR

Hansen and Company, Inc.

Registered Professional Reporters

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Comprehensive Health Care Systems
M3 USA Corporation, et al.

30(b)(6) of WESTFAX, INC., BARRY CLARK
April 20, 2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
WEST PALM BEACH

Case No. 16-cv-80967, Division: Judge Beth Bloom

30(B)(6) VIDEO-RECORDED DEPOSITION OF WESTFAX, INC.,
BARRY CLARK - APRIL 20, 2017

COMPREHENSIVE HEALTH CARE SYSTEMS OF THE PALM BEACHES,
INC., a Florida corporation, DR. ROBERT W. MAUTHE,
M.D., P.C., individually and as the representatives of
a class of similarly-situated persons,

Plaintiffs,

v.

M3 USA CORPORATION, and JOHN DOES 1-12,

Defendants.

PURSUANT TO NOTICE AND AGREEMENT, the
30(b)(6) VIDEO-RECORDED DEPOSITION OF BARRY CLARK was
taken on behalf of the Plaintiffs at 5150 East Yale
Circle, Suite 200, Denver, Colorado 80222, on
April 20, 2017, at 10::13 a.m., before Doreen Girdeen,
Registered Merit Reporter and Notary Public within
Colorado.

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A P P E A R A N C E S

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For WestFax, Inc.:

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Also Present:

John Arnold, videographer, CLVS

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I N D E X

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EXAMINATION OF BARRY CLARK:

April 20, 2017

By Mr. Cohen: 7, 100

By Mr. Poell: 82

By Mr. Hayes: --

INITIAL

DEPOSITION EXHIBITS

REFERENCE

Exhibit 1 Subpoena to Produce Documents, 12

Information, or Objects or to
Permit Inspection of Premises in a
Civil Action; Subpoena Rider

Exhibit 2 WestFax, Inc., Responses to 13
Subpoena

Exhibit 3 10/29/2015 WestFax invoice to 48
Account Number 5725, October 29,
2015, e-mail from Deanna Gasseling
to Douglas Clayton (M3 Mauthe 227,
M3 USA005926)

Exhibit 4 E-mail chain between Douglas 60
Clayton and Melody Ducker, WestFax
invoice to Account Number 5725

Exhibit 5 11/5/2015 WestFax invoice to 49
Account Number 5725; November 2,
2015, e-mail from Deanna Gasseling
to Douglas Clayton

Exhibit 6 11/6/2015 WestFax invoice to 49
Account Number 5725; November 6,
2015, e-mail from Lisa Roe to
Douglas Clayton

Exhibit 7 WestFax invoice for Account Number 65
5725 dated 11/17/2015

Exhibit 8 WestFax invoice to Account Number 65
5725 for 11/18/2015 and 11/18/2015

Exhibit 9 11/19/2015 WestFax invoice to 49
Account Number 5725

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I N D E X, Continued

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| 2 | Exhibit 10 | 11/30/2015 WestFax invoice to Account Number 5725 | 49 |
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| 4 | Exhibit 11 | 12/1/2015 WestFax invoice to Account Number 5725 | 49 |
| 5 | Exhibit 12 | WestFax invoices and e-mail chains | 66 |
| 6 | Exhibit 13 | 3/29/2016 WestFax invoice to Account Number 5725; March 29, 2016, e-mail from Deanna Gasseling to Douglas Clayton | 49 |
| 7 | | | |
| 8 | Exhibit 14 | 4/4/2016 WestFax invoice to Account Number 5725; April 4, 2016, e-mail from Deanna Gasseling to Douglas Clayton | 49 |
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| 14 | Exhibit 17 | WestFax invoices for 5/2/2016, 5/3/2016, e-mail chain between Deanna Gasseling and Andrew Thiers | 69 |
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| 16 | Exhibit 18 | E-mails between one or more people at M3 or MDLinx and one or more people at WestFaxM3 (USA006629, 6630, and 6631) (Exhibit 18 with Daniel Cohen) | 106 |
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| 20 | | (Attached to original and copy transcripts.) (Exhibit 18 with Daniel Cohen) | |
| 21 | | | |
| 22 | PREVIOUSLY MARKED DEPOSITION EXHIBITS: (None) | | INITIAL REFERENCE |
| 23 | | | |
| 24 | | INFORMATION REQUESTED: (None) | |
| 25 | | | |

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1 I N D E X, Continued
2 QUESTIONS INSTRUCTED NOT TO ANSWER:

| 3 | Page | Line |
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1 WHEREUPON, the following proceedings were
2 taken pursuant to the Florida Rules of Civil Procedure.

3 THE VIDEOGRAPHER: We are on the record at
4 10:13 a.m. on April 20th, 2017, at the Offices of
5 William Sather & Associates, CPA, PC, located at 5150
6 East Yale Circle, Denver, Colorado. We are here for
7 the video-recorded deposition of WestFax, Incorporated
8 and its 30(b)(6) designee, Barry Clark, in the matter
9 of Comprehensive Health Care Systems of the Palm
10 Beaches, Incorporated, et al. versus M3 USA
11 Corporation, et al., in the United States District
12 Court for the Southern District of Florida, West Palm
13 Beach, Case Number 16-CV-80967.

14 The videographer is John Arnold; the court
15 reporter is Doreen Girdeen of Hansen & Company.

16 Will counsel please state their appearances
17 beginning with plaintiff's counsel.

18 MR. COHEN: Dan Cohen for the plaintiff and
19 putative plaintiff class.

20 MR. POELL: David Poell, P-o-e-l-l, attorney
21 for the defendant M3 USA Corporation.

22 MR. HAYES: William Hayes, attorney for
23 WestFax.

24 THE VIDEOGRAPHER: Will the court reporter
25 please swear in the witness.

1 BARRY CLARK,
2 having been first duly sworn to state the whole truth,
3 testified as follows

4 EXAMINATION

5 BY MR. COHEN:

6 Q. Good morning, sir. Would you please state
7 your name?

8 A. Barry Clark.

9 Q. Mr. Clark, my name is Dan Cohen. We just met
10 for the first time this morning just before starting
11 the deposition. I'm an attorney, and I represent the
12 plaintiff in the case that's been filed in the federal
13 court in the southern district of Florida seeking to
14 represent a class of persons who claim they received
15 unsolicited fax advertisements. And we're taking your
16 deposition today because it's my understanding that you
17 or your company may have had some involvement in some
18 of the events or activities relating to this case. And
19 I'm really just here to find out what your involvement,
20 if any, was or your company's involvement and what you
21 might be able to help us understand about what that
22 involvement was. Okay?

23 A. Okay.

24 Q. I know you've given a deposition before, but
25 you've never given a deposition to me before. I have a

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1 different way of asking questions. They get long; they
2 get confusing. If you don't know what I'm getting at,
3 just tell me, "Rephrase it," and I will. Okay?

4 A. Okay.

5 Q. It's my understanding that you have an
6 ownership role in a company known as WestFax, Inc.; is
7 that correct?

8 A. Yes.

9 Q. Can you help us understand the nature of that
10 ownership role?

11 A. I own the company.

12 Q. The sole owner?

13 A. Yes.

14 Q. And have you always been the sole owner?

15 A. No.

16 Q. At what point did your sole ownership begin
17 through to its current point?

18 A. About five years ago.

19 Q. Prior to that, what other ownership
20 participation was there?

21 A. 50 percent.

22 Q. And to whom?

23 A. Can you restate the question?

24 Q. Certainly. I'm assuming prior to five years
25 ago, you owned 50 percent, correct?

1 A. Yes.

2 Q. And who -- who was the other owner or
3 co-owners at that time?

4 A. James Edwards.

5 Q. Is Mr. Edwards still alive?

6 A. Yes.

7 Q. Is he in the Denver area?

8 A. No.

9 Q. Do you know what part of the country he lives
10 in?

11 A. Yes.

12 Q. Could you tell us, please.

13 A. The mountains -- Colorado mountains.

14 Q. What does WestFax do?

15 A. Fax broadcasting.

16 Q. And a jury may one day be watching this, and
17 we all have an idea of what fax broadcasting would be
18 in a commercial context, but can you help us understand
19 what that means in terms of what WestFax actually does?

20 A. We send a fax to multiple recipients on behalf
21 of our customers.

22 Q. That's actually what I was going to ask,
23 whether WestFax did that on its own behalf or for the
24 benefit of others?

25 A. For the benefit of others.

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1 Q. We're going to get into some detail about it
2 as the deposition goes on, but I guess I may as well
3 jump right to the chase.

4 A. That's a good idea.

5 Q. The defendant in this case is M3 USA Corp.,
6 and the claim is that faxes were sent on their behalf
7 to multiple recipients. Did WestFax, to your
8 knowledge, participate in fax broadcasting on behalf of
9 M3 USA Corp.?

10 A. WestFax provided fax broadcast service for M3
11 Corp.

12 Q. And we'll get into this in more detail later
13 too. But when you say "provided fax -- fax broadcast
14 service," generally, what does that mean within the way
15 that WestFax's -- the way WestFax operates?

16 A. We send faxes for customers as previously
17 described.

18 Q. And how is that accomplished?

19 A. Through our proprietary technology.

20 Q. If a customer or a client -- whether an
21 existing client or somebody contacting WestFax for the
22 first time about the possibility of using WestFax's
23 broadcast services -- wanted to submit targeted lists
24 of fax numbers for WestFax to broadcast to, what are
25 the different ways that that potential or existing

1 **customer client could deliver that information, those**
2 **lists, to WestFax?**

3 MR. COHEN: I'm going to object on form and
4 vagueness of the phrase "targeted fax list."

5 A. I don't understand your question.

6 **Q. (BY MR. COHEN) Does WestFax provide lists of**
7 **fax recipient populations to its customers or clients?**

8 A. No.

9 **Q. Where does WestFax obtain the lists that are**
10 **then used as part of WestFax broadcast services for its**
11 **clients?**

12 A. We don't obtain them. The customer sends them
13 as part of the order submitted to WestFax.

14 **Q. What are the different ways or methods that a**
15 **customer can deliver such a list to WestFax?**

16 A. They can upload via a web portal, they can
17 e-mail them, they can send them via U.S. mail on a
18 CD-ROM, they can get them to us in any way that a
19 database is transmitted.

20 **Q. In either of those three scenarios -- the**
21 **upload via the portal, the e-mail, or mailing WestFax a**
22 **CD-ROM -- is there a particular format that is**
23 **necessary for WestFax's proprietary system to interface**
24 **properly?**

25 A. No.

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1 **Q. Can WestFax's proprietary technology interface**
2 **with a list provided by a customer in Excel spreadsheet**
3 **form?**

4 A. Yes.

5 **Q. Are there any other formats that you've had**
6 **experience where a customer provides it in a format**
7 **other than Excel and WestFax's technology is able to**
8 **interface with it?**

9 A. Yes.

10 **Q. What other formats can you recall?**

11 A. All database formats.

12 **Q. Including CVS -- or CSV? I'm sorry.**

13 A. Yes.

14 (Deposition Exhibit 1 was marked.)

15 **Q. (BY MR. COHEN) Sir, I'm handing you what's**
16 **been marked as Exhibit 1 for purposes of your**
17 **deposition today. I represent to you this is a**
18 **subpoena to produce documents, and it was served on**
19 **WestFax. And it has a subpoena rider listing 19**
20 **topics. Have you seen this document or this subpoena**
21 **rider before?**

22 A. I or my attorney have.

23 THE DEPONENT: Can we go off the record just a
24 sec?

25 MR. COHEN: Sure.

1 THE VIDEOGRAPHER: Going -- stand by.

2 Going off the record. The time is 10:22.

3 (Recess from 10:22 a.m. until 10:23 a.m.)

4 THE VIDEOGRAPHER: We are back on the record.

5 The time is 10:23.

6 (Deposition Exhibit 2 was marked.)

7 MR. COHEN: Let the record reflect that during
8 the off-record period requested by the witness, he
9 indicated that he's going to stay here until noon, and
10 if we're not done by noon, we'll have to reschedule.
11 Just so the record is clear, I don't know when we'll be
12 done, but we won't be consenting to that.

13 Q. (BY MR. COHEN) So passing to counsel and the
14 witness what we've marked as Exhibit 2. Mr. Clark, I
15 previously showed you Exhibit 1, the subpoena rider
16 containing 19 paragraphs. And I asked you if you had
17 reviewed these, and you said you or your attorney had,
18 correct?

19 A. Yes.

20 Q. Exhibit 2 is a WestFax, Inc., response to the
21 subpoena. Do you see page 2, at the bottom, it's an
22 indication of a notarized sworn signature of Barry
23 Clark?

24 A. Yes. I see that.

25 Q. Is that you?

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1 A. Yes.

2 Q. Is that your signature?

3 A. Yes.

4 Q. You wouldn't have signed that, attesting under
5 oath that these were correct, true answers to these
6 issues set forth in 19 paragraphs on the subpoena rider
7 if you had not, yourself, reviewed it; would you have?

8 A. I would not have signed it if I would have not
9 reviewed it, if that's what your question is.

10 Q. That was my question, sir.

11 What personal recollection do you have of any
12 fax activity that WestFax participated in for the
13 benefit of M3?

14 A. None.

15 Q. Have you ever communicated with anyone from M3
16 or any third-party contractors or marketing entities on
17 its behalf?

18 A. Not to my knowledge.

19 Q. Do you know who within your company would have
20 done that at any time in the past?

21 A. Our customer service department.

22 Q. How many people are in the customer service
23 department?

24 A. It varies. Somewhere between three and five.

25 Q. We have some documents I'll be showing you in

1 a little while that seemed to be e-mails between people
2 in WestFax and people either at M3 or people working on
3 behalf of M3. Were your customer service personnel's
4 communications with customers limited to e-mail or did
5 they also engage in telephone conversations?

6 MR. POELL: Objection. Form.

7 A. I don't know.

8 Q. (BY MR. COHEN) You don't know as to M3 or you
9 don't know at all?

10 A. Well, you're deposing me about the case of M3,
11 so I'm asking [sic] the question specific to M3.

12 Q. Yeah. My question is not specific to M3. My
13 question is, do you know whether in -- across the
14 board, your customer service people, when they interact
15 with clients of WestFax, on occasion, interact by
16 phone?

17 A. Yes, they do.

18 Q. Documents were produced to us by your
19 attorney, Mr. Hayes, who is here today. Are you
20 familiar with the production that Mr. Hayes made for
21 you in compliance with the subpoena?

22 A. Yes.

23 Q. One of the sets of documents was identified as
24 a removal list. Are you familiar with that kind of a
25 document?

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1 A. It's not typically a document, but I
2 understand that we've provided it to you as a document.

3 **Q. What is the nature of the information that's**
4 **contained in a removal list?**

5 A. It's -- they are numbers that the client
6 either provides or people who have opted out using our
7 opt-out service to prohibit future faxes from being
8 sent to those individuals, those fax numbers.

9 **Q. And I just want to be clear, because I was**
10 **misunderstanding what you were saying at first, but**
11 **then I got it toward the end. The whole list is people**
12 **who, in one way or another, have manifested a desire**
13 **not to receive any further faxes. But the list can**
14 **come from or be contributed to by the actual past**
15 **recipients taking advantage of WestFax's opt-out option**
16 **or the customer of WestFax could have provided a**
17 **removal -- a set of names or phone numbers to be**
18 **removed too, correct?**

19 MR. POELL: Object -- objection. Foundation,
20 form, leading.

21 A. WestFax provides removal service, and numbers
22 can be contributed to that removal service by people
23 who call the opt-out number or by the customer that can
24 either upload those numbers or provide them via -- they
25 could call the number, actually, as well. Anyone can

1 call the number.

2 Q. (BY MR. COHEN) I understand, then, that the
3 customer has the option of uploading names or numbers
4 to the removal list or calling in just like a recipient
5 could. Does an actual past recipient of a West -- of a
6 fax through the WestFax broadcasting service -- can the
7 recipient add themselves to the removal list through
8 any way other than calling in the opt out?

9 A. No.

10 Q. This opt-out service, this removal service,
11 where is it located? How is it handled?

12 A. I don't understand your question.

13 Q. Do WestFax employees administer and process
14 and handle all aspects of the removal service?

15 A. I don't know what that means.

16 Q. A recipient calls the removal service. What
17 number do they call?

18 A. They call a number provided to them by
19 WestFax.

20 Q. Are there multiple numbers provided by WestFax
21 to fax recipients to call for the removal service?

22 A. Yes.

23 Q. How many different numbers?

24 A. I don't know.

25 Q. What makes you think there's more than one?

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1 A. Because we have more than one customer that
2 use the service.

3 **Q. You have a different removal number for each**
4 **customer?**

5 A. Yes.

6 **Q. When a person, a recipient of a fax, calls one**
7 **of the WestFax removal-service numbers, who is going to**
8 **answer the phone?**

9 A. It's an automated system.

10 **Q. Did WestFax create the automated system?**

11 A. Yes.

12 **Q. Is the automated system kept on site at**
13 **WestFax?**

14 A. No.

15 **Q. Where is it located?**

16 A. Proprietary location.

17 **Q. Why is the location of the removal service**
18 **proprietary?**

19 MR. HAYES: Objection. That's a -- calls for
20 a legal conclusion. Mr. Clark's not a lawyer.

21 MR. COHEN: Well, to whatever extent the local
22 rules may require certification of questions, we'll
23 certify that question.

24 **Q. (BY MR. COHEN) I assume you would be able to**
25 **tell me the location if the judge ordered you to?**

1 MR. HAYES: Object -- same objection.

2 MR. COHEN: Are you instructing him not to
3 answer?

4 MR. HAYES: Yes.

5 MR. COHEN: On what grounds?

6 MR. HAYES: WestFax has a very simple policy
7 that it doesn't discuss or answer any questions
8 regarding its proprietary software or property.

9 MR. COHEN: The location of a structure or
10 the --

11 MR. HAYES: I don't want to argue with you,
12 Dan. You -- you understand my explanation. That's
13 what it is. If you want to take it up with the court,
14 you go right ahead.

15 MR. COHEN: You understand we'll have to seek
16 sanctions?

17 MR. HAYES: Dan, I don't -- you don't have to
18 negotiate with me.

19 MR. COHEN: I'm not negotiating. I'm making
20 certain that the judge understands I made it fully
21 clear to you and your client --

22 MR. HAYES: You did.

23 MR. COHEN: -- what you are facing.

24 MR. HAYES: You did.

25 MR. COHEN: Okay.

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1 **Q. (BY MR. COHEN) Does anyone work -- anyone**
2 **employed by WestFax work at this location where the**
3 **automated removal service is -- is located?**

4 A. I'm not interested in answering that question.
5 That's -- that discloses information about the
6 proprietary nature of our system that I think is not
7 appropriate.

8 MR. COHEN: We'll go a little bit further, and
9 then we'll just adjourn so we can get an order.

10 MR. HAYES: Dan, do whatever you want.

11 THE DEPONENT: Do you want to adjourn right
12 now? Save us all a bunch of time?

13 MR. COHEN: No. I want to give the judge a
14 little bit more time to watch you.

15 THE DEPONENT: Okay.

16 **Q. (BY MR. COHEN) Subpoena rider topic 1, "Any**
17 **and all agreements entered into by M3 USA Corp.,**
18 **MDLinx, Inc. or any of its officers, agents or**
19 **representatives, including but not limited to Craig**
20 **Overpeck, Jessica McCann, and/or Aki Tomaru, at any**
21 **time with WestFax, Inc., known as WestFax."**

22 **Are there any agreements entered into that are**
23 **subject to the description in subpoena rider paragraph**
24 **1?**

25 A. No.

1 **Q. Were there ever any agreements that would have**
2 **fallen within that description?**

3 A. I don't have a clear understanding of your
4 question.

5 **Q. Well, I asked the first time, are there any,**
6 **and you said no. That presupposes the possibility**
7 **there could have been such agreements in the past, but**
8 **they are no longer in existence.**

9 A. Can you restate the question?

10 **Q. Were there ever, at any point in the past, any**
11 **agreements such as described in paragraph 1?**

12 A. Not that I know of.

13 **Q. Does WestFax enter into agreements with its**
14 **customers at any times?**

15 A. We do enter into agreements with our
16 customers, yes.

17 **Q. Is there a reason why WestFax wouldn't have**
18 **entered into an agreement with M3 or MDLinx for the**
19 **service that WestFax provided to them when it does**
20 **enter into agreements with others?**

21 A. I don't understand what you're asking me.

22 **Q. Well, I asked you if you had an agreement of**
23 **the type described in paragraph 1 with --**

24 A. Okay. Let me restate my answer. I don't
25 know, and I don't understand your question.

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1 **Q. Well, as long as you don't understand my**
2 **question, then I'll have to rephrase it to make certain**
3 **that I can rely on the answer I get.**

4 **A. Thank you.**

5 Can you please restate the question?

6 **Q. Yes. I'm taking a look at your --**

7 MR. HAYES: You need to read your answer.

8 **Q. (BY MR. COHEN) -- answer to the subpoena**
9 **rider. Your answer, which is Exhibit 2 to paragraph 1**
10 **of the subpoena rider, reads, "None - each time the**
11 **customer sent in a fax broadcast order, it received a,**
12 **quote, bounce back, closed quote, e-mail from WestFax**
13 **thanking the customer for the order and confirming with**
14 **the customer that by sending in the order, the customer**
15 **agrees to the terms and conditions on WestFax's**
16 **website."**

17 **Did I read that correctly?**

18 **A. Yes. I understand what my answer was; I**
19 **didn't understand your question. It's very simple if**
20 **you could just restate the question.**

21 **Q. Oh, I'm going to.**

22 **A. Thank you.**

23 **Q. Other than what's described in your answer to**
24 **paragraph 1 of the subpoena rider, has WestFax, with**
25 **any of its customers at any time in the past, had**

1 **actual agreements relating to the faxing services**
2 **beyond what's described in paragraph Number 1 answer to**
3 **the rider?**

4 A. Yes. Our customers agree to our terms and
5 conditions when they become a WestFax customer.

6 **Q. Is that memorialized anywhere?**

7 A. In some cases it is.

8 **Q. And when it is, how is it?**

9 A. Via a signed agreement.

10 **Q. Is there any reason why WestFax did not have**
11 **such a signed agreement with M3 or MDLinx of the type**
12 **you've indicated WestFax has had at times in the past**
13 **with other customers?**

14 MR. POELL: Objection. Form.

15 A. Now the nature of our business has changed in
16 such that the -- sometimes our customers agree to our
17 terms and conditions by checking a box or receiving a
18 bounce-back e-mail, sometimes they sign an agreement.
19 It -- it just depends on the nature of the situation.

20 **Q. (BY MR. COHEN) Well, I understand that**
21 **WestFax does other things than just fax broadcasting.**
22 **And I'm not, at this time, asking you about anything**
23 **beyond fax broadcasting. So I just want to make**
24 **certain that's not creeping in.**

25 **Narrowed to fax broadcasting, under what**

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1 **circumstances would WestFax want a signed written**
2 **contract as opposed to just checking a box for other**
3 **customers?**

4 A. There's no specific circumstances. It's an
5 operational procedure.

6 Q. Who establishes the operational procedure?

7 A. I do.

8 Q. Under the operational procedure you've
9 established, what are the circumstances or why does one
10 customer end up having to sign an agreement where
11 another just checks a box?

12 A. There's no rhyme or reason to that.

13 Q. Paragraph Number 2 of the subpoena rider, it
14 says, "Any and all invoices provided to M3, MDLinx,
15 Overpeck, McCann, and/or Tomaru by WestFax or any
16 affiliated or related company from June 10, 2012 to the
17 present."

18 Your answer -- notarized answer, Exhibit 2,
19 says, "WestFax sends its customers invoices for
20 services rendered. The customer may have such
21 invoices. The invoices WestFax has for the fax
22 broadcast orders it transmitted for the customer are
23 attached."

24 Did I read all that correctly?

25 A. Yes.

1 **Q. Does WestFax maintain a database that retains**
2 **all invoices for all customers?**

3 A. We do. We don't have all invoices for all
4 customers, just because of storage, but we do have a
5 database that contains invoices for customers.

6 **Q. I assume -- well, I don't want to assume.**
7 **Does your system have a protocol by which older data is**
8 **overwritten when there's no room?**

9 A. No.

10 **Q. Does your system have a protocol by which data**
11 **is deleted even when it's not necessary at that moment**
12 **to preserve space?**

13 A. No.

14 **Q. How and why does your system delete data?**

15 A. If we need space, we delete data.

16 **Q. I thought that was the first of the options I**
17 **had given. So data is only deleted off of your**
18 **database when there's otherwise not enough space?**

19 A. Yes.

20 **Q. Does your system do that automatically?**

21 A. No.

22 **Q. Who makes the decision or has decision-making**
23 **authority to approve deleting data to make room?**

24 A. Me.

25 **Q. Does anybody else?**

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1 A. No.

2 **Q. Who actually accomplishes the -- the deletion?**

3 A. One of our tech people or I do.

4 **Q. How many tech people do you have?**

5 A. It's proprietary.

6 **Q. Are they employees or are they outside**
7 **contractors?**

8 A. Both.

9 **Q. I just want to -- I understand, but I need the**
10 **record to be clear. You're refusing to provide the**
11 **numbers of the contract or employed tech people for**
12 **your company?**

13 A. Yes.

14 **Q. And I assume if you're not willing to provide**
15 **the number, you're certainly not willing to tell me**
16 **their names?**

17 A. That's true.

18 **Q. I've read some of your old depositions. It's**
19 **my recollection you said that you did participate in**
20 **the actual creation and development of the proprietary**
21 **software program's technology that is the WestFax**
22 **service, correct?**

23 MR. COHEN: Objection. Foundation, form.

24 A. I'm not a programmer, but I was involved in
25 the process.

1 **Q. (BY MR. COHEN) How long ago -- and first of**
2 **all, I assume any program software's improved over**
3 **time. Would -- would you agree your software has**
4 **improved over time?**

5 MR. POELL: Objection. Foundation, form.

6 A. There hasn't been substantial improvement in
7 our software over time.

8 **Q. (BY MR. COHEN) How long ago --**
9 **approximately -- not an exact date -- how long ago was**
10 **it that your proprietary technology software was**
11 **finished and in use?**

12 A. I don't remember. A long time ago.

13 **Q. What other people, whether employed by WestFax**
14 **or employed by you or independent contractors, had any**
15 **role in the development of the proprietary technology**
16 **and software?**

17 A. It's proprietary.

18 **Q. And you're refusing to provide that**
19 **information?**

20 A. Yes.

21 Just to make sure I clearly understand your
22 question. You're asking me who wrote our software or
23 who was involved in developing our software?

24 **Q. Yes.**

25 A. No. That's not a question that is relevant,

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1 and I'm not going to answer.

2 Q. We can disagree about its relevance, and for
3 now, you can refuse to answer.

4 If you are the person who makes the decision
5 for WestFax about when to delete data to make room on
6 the server or in the program, after you've made a
7 decision that data needs to be deleted to make room,
8 who decides what data will be deleted?

9 MR. POELL: Objection; form. Objection;
10 confusing.

11 MR. HAYES: Dan, I'm going to object as well.
12 The -- unless you tie this to this lawsuit, I don't see
13 how any of this is even relevant. So I'm going to
14 instruct Mr. Clark not to answer any questions that
15 aren't at least remotely related to the lawsuit. Just
16 the general things of how he does -- does things, I
17 just don't see any relevance to the lawsuit.

18 MR. COHEN: Well, I'll disagree with you, and
19 we'll take that up with the judge. But I'm not going
20 to argue with you either.

21 Q. (BY MR. COHEN) Mr. Clark, can you swear on
22 personal knowledge to the court and the jury that
23 WestFax has in its database and has produced to us in
24 this case every single invoice or anything else that
25 ever existed in its database related to any fax

1 **services provided for M3 or MDLinx?**

2 A. I've already answered the questions to the
3 subpoena.

4 **Q. That wasn't my question.**

5 MR. COHEN: I'll move to strike that.

6 **Q. (BY MR. COHEN) You can answer.**

7 A. Okay. Can you restate the question?

8 MR. COHEN: Can you read it back to him,
9 please.

10 THE REPORTER: Sure.

11 Question: Mr. Clark, can you swear on
12 personal knowledge to the court and the jury that
13 WestFax has in its database and has produced to us in
14 this case every single invoice or anything else that
15 ever existed in its database related to any fax
16 services provided for M3 or MDLinx?

17 A. I don't understand the question.

18 **Q. (BY MR. COHEN) To the extent your system or**
19 **any aspect of your system receives any information**
20 **regarding M3 or MDLinx or creates any information**
21 **regarding M3 or MDLinx, can you testify on personal**
22 **knowledge that all such information and data is still**
23 **in your system and none of it has been deleted?**

24 A. No.

25 MR. COHEN: That's why I want to know what his

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1 protocols are for how things are deleted and when
2 they're deleted. So I will ask again, giving you an
3 opportunity, if you choose to, to make the same
4 objection.

5 **Q. (BY MR. COHEN) When you've made the decision**
6 **that you tell me only you and your company make to**
7 **delete data from your system to make room for new data,**
8 **who makes the decision of what existing data is going**
9 **to be deleted?**

10 A. You've only asked me questions relative to
11 invoices. So are you asking me questions about other
12 data as well?

13 **Q. I'm -- my question is as it stands. My**
14 **question wasn't limited to invoices.**

15 MR. HAYES: Again --

16 A. Your previous question was, but --

17 MR. HAYES: Just a sec.

18 THE DEPONENT: Okay. Sorry.

19 MR. HAYES: Again, Dan, my objection is, is
20 that to ask a general question about deletion that
21 isn't related to the lawsuit or the customer or the
22 faxes or the information that may have been for the
23 customer, I just don't see how that's relevant, and so
24 I'm going to ask Mr. Clark not to answer that.

25 **Q. (BY MR. COHEN) And I assume you're going to**

1 follow your attorney's instruction?

2 A. Yes.

3 Q. We will narrow it, then, to my original
4 question, which you pointed out my later question was
5 broader.

6 Are you able to testify on personal
7 knowledge --

8 A. I don't agree to what you said. I don't
9 understand what you said or agree. But go ahead.

10 MR. HAYES: That's fine.

11 A. Yeah.

12 Q. (BY MR. COHEN) Are you able to testify on
13 personal knowledge that all invoices created by the
14 WestFax system relating to M3 or MDLinx is still
15 preserved in the system and none of it has been
16 deleted?

17 MR. POELL: Objection. Compound, form.

18 A. I don't know.

19 Q. (BY MR. COHEN) Paragraph Number 3 seeks, "Any
20 and all receipts provided to M3, MDLinx, Overpeck,
21 McCann, and/or Tomaru by WestFax or any affiliated or
22 related company from June 10, 2012 to the present."
23 And your sworn answer on Exhibit 2 was "none." WestFax
24 doesn't issue receipts at all?

25 A. No.

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1 **Q. Is WestFax paid by its customer for the fax**
2 **services it provides before it does them or after?**

3 A. Both.

4 **Q. What about with M3 and MDLinx; how was that**
5 **handled?**

6 A. I don't remember.

7 **Q. If the invoices that we have obtained from**
8 **WestFax from the subpoena compliance show invoice, a**
9 **job, a date, and it says "terms net 30," would that --**
10 **at least as to each invoice that says that, would that**
11 **be a good indication that WestFax billed M3 or MDLinx**
12 **after the fax broadcast?**

13 MR. POELL: I'm going to object on form and
14 foundation.

15 A. That's a general data field that is sometimes
16 maintained, sometimes not. So I would not make the
17 correlation that if it says "net 30" that they paid
18 after.

19 **Q. (BY MR. COHEN) It doesn't tell us one way or**
20 **another?**

21 A. I just answered the question.

22 So are you asking a different question?

23 **Q. I'm saying, we can't infer one way or the**
24 **other, correct?**

25 A. Correct.

1 Q. It -- it doesn't tell us either way. Thank
2 you.

3 Number 4 on Exhibit 1, subpoena rider, "Any
4 and all reports provided to M3, MDLinx, Overpeck,
5 McCann, and/or Tomaru by WestFax or any affiliated or
6 related company from June 10, 2012 to the present."

7 And your answer at Exhibit Number 2 is, "The
8 customer did not request any reports." Correct?

9 A. Yes.

10 Q. What kind of reports can WestFax offer to
11 customers that the customer in this case could have
12 requested but didn't?

13 MR. POELL: I'm going to object to vagueness,
14 meaning the report. Foundation.

15 A. We can give them any kind of report they want.
16 There are several different options, and we can
17 customize their report as well or we can give them no
18 report if they don't want them.

19 Q. (BY MR. COHEN) Does WestFax -- strike that.
20 Does WestFax's technology and system allow it
21 not only to recognize out of a total population of
22 facsimile transmissions how many were successfully sent
23 and how many failed, but also to identify the specific
24 numbers that succeeded and the specific numbers that
25 failed?

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1 MR. POELL: Objection; form. Objection;
2 leading.

3 A. Are you asking me if we have a way to
4 determine which faxes were successful and which were
5 not?

6 Q. (BY MR. COHEN) Yes.

7 A. Yes.

8 Q. And I just wanted to make sure your answer is
9 as specific as my intended question has been. You can
10 tell which ones were successful by phone number,
11 correct?

12 MR. POELL: Objection. Form.

13 A. Yes, we can. However, sometimes numbers are
14 reported, sometimes numbers are forwarded, sometimes
15 faxes are received by somebody other than the intended
16 recipient. So my testimony is that we don't know who
17 the exact recipient is based on that report. We just
18 know that the attempt that we made to a specific number
19 was successful.

20 It's really important to note that in this
21 case and in all cases, there's no specific way of
22 knowing whether the fax was actually received by our
23 system or who received it.

24 Q. (BY MR. COHEN) Received by your system?

25 A. No. By the recipient.

1 **Q. I wanted to make certain I understood what you**
2 **were saying. I appreciate your clarification.**

3 MR. COHEN: And I move to strike as
4 nonresponsive.

5 MR. POELL: I will object to the request to
6 strike.

7 THE DEPONENT: Nonresponsive? I don't
8 understand.

9 MR. HAYES: You -- you don't have to.

10 THE DEPONENT: Okay. All right.

11 **Q. (BY MR. COHEN) If a customer indicated to**
12 **WestFax, prior to a particular broadcast for that**
13 **customer, that the customer wanted a report after the**
14 **broadcast of how many transmissions were attempted, how**
15 **many were successful, how many failed -- and for the**
16 **successful, the actual phone numbers that were**
17 **successful -- would you be able -- would WestFax be**
18 **able to provide such a report?**

19 A. I'm a little unclear as to your question, but
20 I think yes.

21 **Q. If a customer didn't ask for that kind of**
22 **detailed information and they get their invoice and**
23 **they pay it and at some point after the fact, they**
24 **decide they'd like to see that kind of information, is**
25 **there some period of time after the broadcast that that**

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1 information is likely or certain to remain in WestFax's
2 system retrievable to provide the customer with that
3 information?

4 MR. POELL: Objection; form. Objection;
5 compound.

6 A. When you say "that information," I don't know,
7 specifically, what you're -- can you be a little bit
8 more specific?

9 Q. (BY MR. COHEN) Sure. If a customer did not
10 request the information of the type we've been
11 discussing, which is that WestFax's system can identify
12 how many faxes were attempted, how many succeeded, how
13 many failed, and as to the ones that succeeded, exactly
14 which phone numbers those were, if the customer did not
15 ask for a report before the broadcast went out that
16 contained that information, but then at some point
17 after the broadcast went out, after they got the
18 invoice, after they paid it, the customer decided that
19 would be some useful information they'd like to see,
20 and they came back to WestFax and said, "Hey, as to
21 that broadcast you did for us in the past, can you get
22 us that information -- the attempts, the successful,
23 the fails, and as to the successfals, the phone numbers
24 for the successfals -- is there some period of time
25 after the broadcast when that information would remain

1 in WestFax's system retrievable so that the customer
2 could get it?

3 MR. POELL: Objection; form. Objection;
4 compound.

5 A. I don't believe there is.

6 Q. (BY MR. COHEN) And only because of the way I
7 phrased the question -- I said is there some period of
8 time after the broadcast where the customer could ask
9 for that and you could still get it, and you said you
10 don't believe there is. As you understand it, if the
11 customer didn't request it beforehand, it's never
12 recorded at all, so it's never available after the
13 broadcast?

14 A. I'm straining to understand the nature of your
15 question. But if you're asking me if we can recreate a
16 report after a period of time has elapsed, then I don't
17 believe that we can.

18 Q. And I appreciate that. I wasn't asking if you
19 can quote, unquote, "recreate a report." I was wanting
20 to know if the electronic data that would have
21 generated a report of successfals versus unsuccessfuls
22 with correlating phone numbers to each, if the
23 electronic data containing that information that was
24 not put into a report for the customer right at the
25 time of the broadcast remained in the system for any

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1 **period of time where it could then be captured if the**
2 **customer wanted it later.**

3 MR. POELL: Objection; foundation. Objection;
4 form.

5 A. I don't believe so.

6 **Q. (BY MR. COHEN) Not for any period of time?**

7 A. I don't believe so.

8 **Q. What is the basis for your belief in that**
9 **regard?**

10 A. Several items specifically relating the raw
11 data to that specific broadcast, that's the most
12 problematic. But there are several other issues that
13 don't come to mind. But that's the most significant.

14 **Q. On some invoices that you have produced for**
15 **the M3, MDLinx broadcasts, it indicates -- and we'll be**
16 **-- we'll look at some, but I'm trying to make sure I**
17 **understand some general concepts. It indicates a**
18 **number of faxes and an amount to be paid for that**
19 **number of faxes. And I ask you because I assume you**
20 **know how your invoices are laid out and what they're**
21 **supposed to mean. The number of faxes for a specific**
22 **invoice sent to a customer after the broadcast, is that**
23 **the number of successfals or is that the total number**
24 **tried?**

25 MR. POELL: Objection. Foundation. We

1 haven't had any testimony about the contents of the
2 invoices.

3 A. That is the number of faxes that we've
4 received a response from the recipients's fax machine
5 that would indicate that the fax was received by the
6 recipient's fax machine.

7 Very important to note that that has no
8 relevancy as to whether or not the fax was actually
9 received by the intended recipient.

10 **Q. (BY MR. COHEN) Thank you.**

11 MR. COHEN: I'll move to strike everything
12 starting with "very important to note" as
13 nonresponsive.

14 MR. POELL: I will object to the request to
15 strike the testimony.

16 **Q. (BY MR. COHEN) With regard to paragraph 4 of**
17 **the subpoena rider and your answer in Exhibit Number 2,**
18 **"The customer did not request any reports" --**

19 A. When you say "paragraph 4," do you mean
20 Question Number 4?

21 **Q. Yes.**

22 A. Okay.

23 **Q. And your corresponding answer on Exhibit 2**
24 **where you say, "The customer did not request any**
25 **reports," does WestFax have any documentation of any**

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1 sort that in any way reflects what M3 or MDLinx did or
2 did not request in terms of reports?

3 A. Not to my knowledge.

4 Q. What is your basis for saying the customer did
5 not request any reports?

6 A. I don't remember, specifically, this -- when I
7 -- when we did the research on this, it was several
8 months ago, so I don't remember, specifically, how we
9 came to that conclusion.

10 Q. And I appreciate that. When you gave your
11 answer just now, you said "when we did the research."
12 And I understand we're taking your deposition as a
13 corporate designee, you speak for the company on its
14 behalf -- WestFax, I mean. But when you said "we did
15 the research," who participated in any of the search or
16 investigation to attempt to comply with the subpoena
17 rider or answer these subpoena questions?

18 A. Myself and my counsel.

19 Q. Mr. Hayes?

20 A. Yes.

21 Q. Anyone else from within your company?

22 A. Not aware of anyone, but there may have been
23 some other people that helped.

24 Q. We were talking earlier about whether it would
25 be possible for WestFax to go into its system and

1 retrieve data for a past broadcast in terms of
2 successfuls versus unsuccessfuls and the numbers
3 corresponding, and you indicated you did not believe
4 that could be done. And you gave me -- among other
5 reasons, you said you couldn't think of it at the
6 moment. But one thing you said was relating to raw
7 data to a specific broadcast, you didn't think it could
8 be done.

9 Have you ever attempted or, to your knowledge,
10 has anyone attempted to try to do that, to correlate
11 raw data to a specific past broadcast and the data that
12 is kept on WestFax's server?

13 MR. POELL: I'm going to object just to the
14 extent that the first part of the question
15 misrepresents any part the witness's prior testimony.

16 A. Can you restate the question?

17 Q. (BY MR. COHEN) Have you or, to your
18 knowledge, has anyone else ever attempted, after the
19 fact, after a broadcast, to go back into the data in
20 your system to attempt to relate or correlate raw data
21 to a specific broadcast in the past?

22 A. There's -- there would be no -- there are no
23 data fields that would present that opportunity, to the
24 best of my knowledge.

25 Q. And that sounds more like an explanation why

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1 **you wouldn't even try. But my question was, to your**
2 **knowledge, have you or anyone else ever even attempted**
3 **to do so to see if it was possible?**

4 A. No.

5 Q. Subpoena rider paragraph Number 5 says, "Any
6 **and all e-mail correspondence, including but not**
7 **limited to any and all attachments, between M3, MDLinx,**
8 **Overpeck, McCann, Tomaru, or any other employee or**
9 **agent of M3 or MDLinx and WestFax or any affiliated or**
10 **related company from June 10, 2012 to the present."**

11 And your answer was "none." Am I correct that
12 **was your answer?**

13 A. Yes.

14 MR. HAYES: Dan, what is the purpose of
15 re-asking all the questions he's already answered under
16 oath?

17 MR. COHEN: Because then I'm going to have
18 follow-up questions, and it serves to set the context.

19 MR. HAYES: Again, to move things along,
20 perhaps we could stipulate that the answers are the
21 responses to the subpoena rider, and you could just go
22 on with your follow-up questions.

23 MR. COHEN: Sure, as long as defense counsel
24 stipulates that when we're presenting this to the jury,
25 we can stop the videotape and we can read to the jury

1 the subpoena rider question and then we can read to the
2 jury the subpoena answer, and then we can turn the
3 videotape back on.

4 MR. POELL: Reserving my right to object in
5 the future, for purposes of moving the deposition
6 along, at this point, I'm fine with that arrangement.

7 MR. COHEN: I don't understand what it means
8 to say "reserving my right to object in the future."

9 MR. POELL: Well, I mean, you're stipulating
10 something on your terms right now during the
11 deposition. I'm not going to agree to something on the
12 record that's going to be binding on me later in the
13 litigation.

14 MR. COHEN: That's the nature of a
15 stipulation.

16 So we don't have a stipulation, so I'm afraid
17 we won't be able to do that, Mr. Hayes.

18 **Q. (BY MR. COHEN) I'll represent to you, sir,**
19 **that we have received e-mail communications between**
20 **persons in your company, WestFax, and people with M3**
21 **and MDLinx pertaining to fax broadcasts. So -- and I'm**
22 **only asking you to assume that for the sake of telling**
23 **you there was e-mail communication between your company**
24 **and M3 and MDLinx. Why would -- why would WestFax no**
25 **longer have e-mail correspondence between itself and**

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1 **its customers if there was e-mail correspondence?**

2 MR. POELL: Objection; foundation. Objection;
3 argumentative.

4 A. There's no utility to that information for us
5 or for our customer.

6 **Q. (BY MR. COHEN) Well, if you had a dispute**
7 **with a customer in the future about what was or wasn't**
8 **authorized or what was or wasn't agreed, and there were**
9 **e-mails about it, it would be helpful to have that kind**
10 **of information to explain and justify WestFax's conduct**
11 **vis-a-vis its customer, wouldn't it?**

12 MR. POELL: Objection. Form.

13 A. No.

14 **Q. (BY MR. COHEN) So what process does WestFax**
15 **use or follow or protocol followed to delete e-mail**
16 **communications it has with its customers?**

17 MR. POELL: Objection. Foundation.

18 A. We -- there's no utility to saving those
19 e-mails. If the customer wants a report, the report
20 provides the necessary information.

21 **Q. (BY MR. COHEN) I understand that's why you**
22 **don't save them. But e-mails don't just disappear on**
23 **their own; somebody has to delete them. So what is the**
24 **protocol for how and when e-mails with a customer are**
25 **deleted?**

1 A. As soon as the order is processed, we delete
2 the e-mail.

3 **Q. Even before the broadcast actually issues?**

4 A. Yes.

5 **Q. Is that by some kind of automatic setting in**
6 **your company's e-mail system or is that a protocol that**
7 **each person who works for WestFax knows they are to do**
8 **as to all such e-mails?**

9 A. It's a manual protocol.

10 **Q. Meaning each person has to do it each time?**

11 A. I wouldn't put it that way. I would say, as
12 I've answered the question, it's a manual protocol.

13 **Q. Well, help those of us who aren't as tech**
14 **savvy. As you understand, what does that mean, to**
15 **describe it as a quote, unquote, "manual protocol"?**

16 A. They are deleted by the person who processes
17 the order.

18 **Q. What function -- and I'm looking for more than**
19 **just process the order, because I want to know what**
20 **"processes the order" means, and I want to know if**
21 **other WestFax personnel have any role in an order.**

22 **The person in WestFax who processes the order,**
23 **exactly what do they do? What is their function and**
24 **how do they do it?**

25 A. That's proprietary. I refuse to answer the

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1 question.

2 Q. Other than the person -- and we'll take that
3 up with the judge -- but other than the person at
4 WestFax who processes the order that we just talked
5 about and you didn't want to give me detail about,
6 other than that person, does anybody else at WestFax
7 have any role or responsibility with regard to a
8 particular customer's specific broadcast or -- or,
9 alternatively, is that one person who quote, unquote,
10 "processes it," do they do it all? Are they
11 responsible for all of it?

12 MR. POELL: Objection. Compound.

13 A. I'm struggling to understand your question. I
14 don't understand what you're getting at.

15 Q. (BY MR. COHEN) Well, a customer deals with
16 WestFax to obtain, in the end, a fax broadcast
17 utilizing WestFax's fax broadcasting services. And at
18 some point in the process of accomplishing the end goal
19 of getting the fax broadcast to issue, there's this
20 person who processes it, the person you don't want to
21 tell me what they do. I'm saying take them out of the
22 equation. Does anybody else from WestFax have any role
23 or participation in bringing about the end result, the
24 actual fax broadcast, other than that one person who
25 quote, unquote, "processes it," that you don't want to

1 **tell me about?**

2 MR. POELL: Objection; form. Objection;
3 argumentative.

4 A. I don't understand what you're getting at. I
5 don't know. The answer is I don't know.

6 **Q. (BY MR. COHEN) Okay. Is there only one**
7 **person who handles each customer's broadcast?**

8 A. No. There may be several people.

9 **Q. Would all of them -- assuming it's a**
10 **situation -- I know it's not always several, but**
11 **assuming we have a situation like where it's several**
12 **people participating in the handling of a customer's**
13 **broadcast, would all of them be doing the processing**
14 **that you told me is proprietary and you wouldn't**
15 **discuss?**

16 A. They can do various things. They can provide
17 information about billing. There are several different
18 roles in providing service to our customers.

19 **Q. Have any of your current or former employees,**
20 **to your knowledge, ever been deposed in any TCPA case?**

21 A. Not to my knowledge.

22 MR. HAYES: Do you want some water?

23 THE DEPONENT: I'm okay. Thank you.

24 **Q. (BY MR. COHEN) Early in the deposition, we**
25 **had been talking about the way in which a customer of**

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1 WestFax can deliver to WestFax a list, and we talked
2 about the formats that would be necessary to interface
3 with WestFax's system. And you said, "All of them."
4 Can WestFax's proprietary technology successfully
5 interface with merely a PDF?

6 MR. POELL: Objection. Vague.

7 A. What do you mean interface with a PDF?

8 Q. (BY MR. COHEN) Well, we didn't have questions
9 about what I meant by that word earlier, but I'll try
10 to be more clear. Can a customer, either by e-mail,
11 using the upload of WestFax's portal, or sending by
12 U.S. mail on CD-ROM a list of desired fax recipients,
13 can that list be in PDF form? In whichever of those
14 three ways it's delivered to Westfax, can Westfax's
15 proprietary technology utilize and extract from that
16 PDF list a usable list that can function within
17 WestFax's proprietary technology to accomplish that fax
18 broadcast?

19 MR. POELL: I'm going to say objection to
20 form.

21 A. No. PDF is not a database format.

22 (Deposition Exhibit 3 was marked.)

23 THE DEPONENT: There's no Bates stamp on this
24 one (indicating). I don't know what this is.

25 MR. HAYES: It's another -- apparently, Dan is

1 giving you some documents he's going to ask you
2 questions about.

3 THE DEPONENT: Okay. That one is not stamped.

4 MR. HAYES: I think the stamp is on the first
5 one, and this is a continuation of that.

6 THE DEPONENT: We have that one stamped.

7 MR. HAYES: Oh, I gave you the wrong one.

8 Okay.

9 (Deposition Exhibits 3 through 17 were
10 marked.)

11 Q. (BY MR. COHEN) Mr. Clark, I've passed down to
12 you, with the assistance with other counsel at the
13 table, what I've marked as Exhibits 3 through 17.

14 MR. COHEN: And for the record, I've also
15 given both other counsel copies.

16 Q. (BY MR. COHEN) Exhibit Number 3 is a
17 three-page document. And I'd like to draw your
18 attention first to the second page of Exhibit Number 3.
19 Does this document appear to be an invoice in the
20 format that would be issued by WestFax for fax
21 broadcasting for a customer?

22 A. It was the format we used in 2015.

23 Q. And to the extent there's a date indicated of
24 October 29, 2015, would that correspond, to your
25 recollection, of when this was a format for your

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1 **invoices?**

2 A. Yes.

3 **Q. Under "Account Number," there's 5725. Can you**
4 **tell us what that account number means, how it's come**
5 **by, and what it designates?**

6 A. That's the account number.

7 **Q. For whom?**

8 A. For MDLinx.

9 **Q. And who gave MDLinx that account number?**

10 A. WestFax.

11 **Q. Is that an automatically-generated number?**
12 **When a first-time new customer comes, the system**
13 **decides in some sequential fashion what the next**
14 **customer's number will be, or does somebody actually**
15 **manually select that?**

16 MR. POELL: Objection. Form, compound.

17 A. The system selects the account number.

18 **Q. (BY MR. COHEN) And in your experience, does**
19 **the same customer retain the same account number**
20 **throughout sequential fax broadcasting activities?**

21 A. I don't know what "sequential fax broadcasting
22 activities" are.

23 **Q. Well, MDLinx asks WestFax to utilize its**
24 **broadcasting services, pays for it; comes back two**
25 **weeks later, does it again; comes back a month later,**

1 does it again; comes back six months later, does it
2 again. Will the account number that WestFax has given
3 to MDLinx the first time remain the same throughout?

4 MR. POELL: Objection. Form.

5 A. Yes, unless they set up a different account.
6 So it can certainly change.

7 Q. (BY MR. COHEN) As we sit here today, do you
8 have any information or knowledge indicating that at
9 any time MDLinx changed its account number?

10 A. I don't know.

11 Q. Under the "Item Description," it's got two
12 fields. What draws the distinction between those two
13 -- two fields? Are they two different broadcasts?

14 What are -- what does it mean to have two
15 separate fields there under "Item Description"?

16 A. I don't have a clear understanding what you
17 mean by "fields," but there are two distinct fax
18 broadcasts -- broadcasts listed on this invoice.

19 Q. And so drawing your attention to the second
20 one further down the page, it says, "Broadcast fax per
21 page normal..." For a layperson who has no idea about
22 faxing, in general, and certainly nothing -- no
23 knowledge about commercial fax broadcasting, what does
24 that language signify?

25 A. It signifies that it's a normal resolution

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1 quality versus fine, which is a higher resolution
2 quality.

3 Q. And then the "MDLinx" after is simply an
4 identifier of the customer?

5 A. Yes.

6 Q. The date -- because I'm looking at the date of
7 the invoice and then back at the date of -- for this
8 broadcast, and they are the same. So is this -- is
9 October 29, 2015, not only the date of the invoice but
10 also the date the broadcast actually issued?

11 MR. POELL: Objection. Form.

12 A. The date indicated in the "Item Description"
13 category is the date the broadcast was completed, not
14 necessarily the date that all the recipients were
15 contacted. The date next to account number and between
16 account number and invoice number is the date we issued
17 the invoice.

18 Q. (BY MR. COHEN) And I appreciate that
19 distinction. To your knowledge, does the WestFax
20 system generate the invoice contemporaneous with
21 completing the broadcast so that the broadcast date
22 will be the same as the invoice date?

23 A. No. That's why I made the distinction.

24 Q. So it's -- "coincidental" is the wrong word,
25 but the fact that the two dates on the second page of

1 **Exhibit 3 are the same here doesn't mean they'll always**
2 **be the same, right?**

3 MR. POELL: Objection. Form.

4 A. Again, the date of the invoice is the number
5 that -- is the date that is indicated between account
6 number and the invoice number. The date indicated in
7 the "Item Description" is the date the broadcast
8 completed.

9 Q. (BY MR. COHEN) In your experience, have there
10 been times when those two dates are actually identified
11 as different dates on the same invoice?

12 A. Yes.

13 Q. And I think we covered this, but just to make
14 certain we were understanding the same things without a
15 document in front of us, to the right of "Item
16 Description," the column "Quantity" for the second
17 broadcast shows 2,879, correct?

18 A. No. It says 2,879.0.

19 Q. Numerically, is that a different number?

20 A. No.

21 Q. And am I correct just -- and if I'm wrong, you
22 correct me. Based on a prior discussion, am I correct
23 that 2,879.0, as a quantity, is identifying the number
24 of what your system recorded as successful
25 transmissions on that broadcast?

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1 MR. POELL: Objection. Form.

2 A. That's the number where we received a tone
3 from the recipient's fax machine indicating they had
4 received the document. As I've noted before, that
5 doesn't indicate that the intended recipient received
6 the fax.

7 Q. (BY MR. COHEN) And I -- thank you.

8 MR. COHEN: I'll move to strike everything
9 starting with "As I've noted before" as nonresponsive.

10 MR. POELL: And I will object to the request
11 to strike the testimony of the witness.

12 Q. (BY MR. COHEN) You have mentioned on a couple
13 of occasions this idea of a tone. Can you explain your
14 understanding, to the extent you're using that
15 reference to the tone that your system receives back
16 from the recipient's machine and that it records that,
17 what is the significance of that tone as your system
18 records it?

19 MR. POELL: Objection; form. Objection;
20 compound.

21 A. What is the significance of the tone? That is
22 an indication that the fax has been received by the
23 recipient's fax machine or fax server or fax process.

24 Q. (BY MR. COHEN) Under "Item Description,"
25 Exhibit 3, the second broadcast that we've been talking

1 about, it says, "Billing Code R9170F40." Does WestFax
2 generate the billing code for a particular broadcast?

3 A. No. It's provided by the customer.

4 Q. If we go to the third page of Exhibit 3 -- and
5 this is a document, at the bottom, Bates labeled M3
6 USA005926. I'm not asking you, sir, to authenticate
7 this, but I'll ask you does this appear to be an e-mail
8 chain between some people at WestFax and some people at
9 usa.m3?

10 A. It's -- it appears to be that, but I can't
11 authenticate that it's legitimate.

12 Q. At the very top of the page, the sender is
13 identified as Deanna Gasseling. And Deanna is
14 D-e-a-n-n-a. Gasseling is G-a-s-s-e-l-i-n-g.

15 And she's indicated at deanna@westfax.com. Do
16 you know who Ms. Gasseling is?

17 A. Yes.

18 Q. As of the indicated date of this apparent
19 e-mail, October 29, 2015, was she employed by WestFax?

20 A. Yes.

21 Q. What was her title?

22 A. Account manager.

23 Q. As an account manager interacting --
24 apparently, according to what we see -- and I
25 understand you can't authenticate the e-mails --

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1 interacting with what appears to be two people from
2 usa.m3 about a fax broadcast, would she be or have
3 been, at that time what she was doing there, the person
4 doing the processing of a broadcast that you said is
5 proprietary and you wouldn't go into the details of
6 exactly what they do?

7 MR. POELL: Objection; form. Objection;
8 vague.

9 A. She assists the customer in sending the order.

10 Q. (BY MR. COHEN) Is that part of the processing
11 that was referenced earlier in the deposition?

12 A. It's exactly what I said it was. They are
13 assisting the customer to send an order.

14 Q. Yes. And I had asked you earlier what
15 processing involved, and you refused to tell me. And
16 I'm asking you is what Ms. Gasseling is doing here part
17 of the processing?

18 MR. HAYES: Again, the processing as to how we
19 do it as opposed to what we did is proprietary. So I
20 would instruct Mr. Clark not to answer questions that
21 say how West -- how WestFax does things.

22 MR. COHEN: Well, I disagree with the
23 objection, but it doesn't even apply to my question.

24 MR. HAYES: The objection still stands. So
25 I've asked Mr. Clark not to ask that ques -- answer

1 that question.

2 MR. COHEN: We'll take all these up with the
3 judge.

4 Q. (BY MR. COHEN) So if we're looking at the
5 third page of Exhibit 3, this apparent e-mail
6 communication back and forth between Ms. Gasseling and
7 people at usa.m3, in the subject line, there is a
8 reference to PO number R9170F40. Do you see that?

9 A. Yes.

10 Q. And in your experience, is that common when
11 your account managers are helping customers with a
12 broadcast, that the subject heading on an e-mail will
13 include the billing code designated by the customer?

14 A. Not necessarily.

15 Q. Have you seen it before?

16 A. I don't know.

17 Q. In this instance, the PO number R9170F40 shown
18 in the subject lines of the e-mails on the second page
19 of Exhibit 3 are the same as the second broadcast
20 billing code on the WestFax invoice, correct?

21 A. Yes.

22 Q. Did you ever have any involvement at all with
23 MDLinx or M3's business with WestFax?

24 A. What does that even mean?

25 Q. Did you communicate with anybody? Did you

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1 **participate in the processing of their broadcasts?**

2 A. When you say "you," are you asking me as a
3 representative of WestFax or was I personally involved?

4 **Q. Personally.**

5 A. No.

6 **Q. The first page of Exhibit 3 appears to be a**
7 **fax transmission of a fax, and in the middle of the**
8 **page, it's got an invite code. And it's R9170F40,**
9 **which is the same billing code on the WestFax invoice**
10 **and the same purchase number order code shown in the**
11 **subject lines of the e-mails at page 3 of the exhibit.**
12 **In your experience, is that something that WestFax or**
13 **the customer would sometimes do, is incorporate the**
14 **customer's designated billing code into a fax**
15 **broadcast?**

16 A. We don't look at the fax broadcast.

17 **Q. What does that mean?**

18 A. It means exactly what I said. We don't look
19 at the document.

20 **Q. You don't look at the actual fax?**

21 A. No.

22 **Q. Nobody at WestFax looks at the fax at any**
23 **time?**

24 A. No.

25 **Q. So you aren't able to tell me whether it's**

1 common at WestFax to include the customer's designated
2 billing information in the fax because nobody at
3 WestFax ever looks at the fax, right?

4 MR. POELL: Objection. Form.

5 A. Correct.

6 Q. (BY MR. COHEN) And I will not nor would you
7 want me to or stand for it go through every single one
8 the same way. What I -- what I want to see if we can
9 understand when the jury or anyone is looking at
10 WestFax invoices, the account number is the number that
11 designates the customer, correct?

12 A. Yes.

13 Q. Generated by WestFax?

14 A. I've already answered that question.

15 Q. But I want to -- it will cover all of them,
16 not just the one invoice we went through. These are
17 things that applied to all?

18 A. Understood, yes.

19 Q. Okay. And I'll do a broader question. To the
20 extent we ask what things mean and what they signify in
21 various fields of Exhibit 3 on the WestFax invoice,
22 your answers would be the same for any WestFax invoices
23 for other broadcasts involving account number 5725?

24 A. I can't --

25 MR. POELL: Objection; form. Objection;

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1 foundation.

2 A. I can't speak, specifically, to each of these
3 documents. But in general, the policy hadn't changed
4 during that period, as far as I know.

5 Q. (BY MR. COHEN) Okay. And when we see, on
6 Exhibit 3, page 2, the WestFax invoice that the
7 quantity -- and we've already discussed what that
8 number signifies, but when we see that the number is
9 2,879.0, did somebody manually enter that or does the
10 WestFax system automatically take from its data for the
11 broadcast that information and automatically plug it
12 into the invoice, or does somebody have to manually
13 look at the broadcast data and then manually enter it
14 into the invoice?

15 MR. POELL: Objection; form. Objection;
16 compound. Objection -- and assumes that those data
17 generated with every FaxWest [sic].

18 A. It's an automated process.

19 Q. (BY MR. COHEN) Drawing your attention to
20 Exhibit 4, the fourth page of Exhibit 4 is another
21 apparent e-mail chain. And there's a different person
22 a little below halfway. It's a woman named Melody
23 Ducker. Did I pronounce that right?

24 A. Yes.

25 Q. And this is dated October 26, 2015. Was

1 **Ms. Ducker an employee of WestFax at that time?**

2 A. Yes.

3 **Q. What was her title?**

4 A. Account manager.

5 **Q. And are Ms. Ducker and --**

6 A. Ms. Gasseling.

7 **Q. -- Ms. Gasseling, are they both still employed**
8 **by WestFax?**

9 A. No. Ms. Ducker is not.

10 **Q. But Ms. Gasseling is?**

11 A. I've already testified to that.

12 **Q. So it shows Ms. Ducker e-mailing to Douglas**
13 **Clayton and saying for a certain purchase order number,**
14 **"Please see attached test page."**

15 **What does that mean? What would that signify?**
16 **What does that mean is going on?**

17 A. I don't know, specifically, in this case. But
18 a customer will typically request that a test page be
19 sent with the document so they can confirm the
20 formatting. So perhaps that was what was happening
21 here.

22 **Q. Okay. And then at the top of that page,**
23 **Mr. Clayton responds to Ms. Ducker and says, "Looks**
24 **good. Please send."**

25 **What would that -- you're the owner of**

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1 **WestFax; you're here as WestFax corporate designee.**
2 **What would that signify to WestFax in terms of whether**
3 **or not that customer had authorized that fax broadcast**
4 **order?**

5 A. I think it's self-explanatory. It would
6 indicate that the customer had viewed the test page and
7 was wanting to confirm that the test page is
8 appropriate to be sent.

9 Q. And that they were confirming it?

10 A. That's what I just said.

11 Q. Okay. The last page of this, I'm only going
12 to ask you about it once, because it shows up in other
13 doc -- other of these documents, but I just need an
14 explanation one time. It says "Broadcast Order Form"
15 -- "Broadcast Fax Order." And then it's got, below
16 that, "Order Information" and a lot of pieces of
17 information or bits of information. Is this a WestFax
18 document that information is entered into?

19 A. I don't recognize this document.

20 Q. A little more than halfway down the text,
21 there is a line that says "Customer Merge," and it says
22 "yes" -- I'm sorry -- "Custom Merge," and it says
23 "yes." Is that a term that WestFax uses with regard to
24 its fax broadcasting services, "custom merge"?

25 A. A custom -- yes, it is a term that we use.

1 However, I don't know how it applies to this document.
2 This seems to be profile information. But -- but I
3 don't recognize this document. A custom merge is a
4 mail merge document where individual data fields would
5 be merged into the document.

6 Q. And just for people who -- and I -- I don't
7 claim to know nearly what you know, but people who have
8 very little information about electronics or tech, the
9 custom merge would be able to take a customer list that
10 might be provided in a data form by a customer to
11 WestFax, and it would allow recipient's specific
12 information to be extracted from fields in the data and
13 inserted into fields on the outgoing fax broadcast?

14 MR. POELL: Objection; form. Objection;
15 foundation.

16 A. Yes.

17 Q. (BY MR. COHEN) Almost all of these documents
18 that we have in front of you -- not all of them, but
19 almost all of them -- show that to the extent there's a
20 fax transmission header, it indicates a fax number of
21 202-478-0237. Do you have any knowledge or familiarity
22 of that number?

23 A. No.

24 Q. Does WestFax have the ability to have its fax
25 broadcasts that it sends out show that they are coming

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1 -- on the recipient's header line, does WestFax have
2 the ability to control that header line to show a
3 number such as 202-478-0237?

4 A. I wouldn't describe it that way, no.

5 Q. And when you say it that way, it makes me
6 sound like I'm just not articulating it the way it
7 should be articulated, but that there is a way somebody
8 who knows how things are done could articulate it.

9 Can WestFax cause a fax broadcast to issue and
10 a recipient see a header fax number originating from a
11 different number, like 202-478-0237?

12 MR. POELL: I'm going to object to form;
13 confusing.

14 A. That number is -- is something provided by the
15 client that they have indicated as the -- as the
16 sending fax number.

17 MR. COHEN: Mr. Hayes, I intend to, at some
18 point, just show Mr. Clark the entire document that was
19 produced as the removal list, the entire document that
20 was produced as the invoices. And I'm actually -- I
21 have a jump drive that I'm going to put a sticker on,
22 and I'm going to let him put it in a laptop and look at
23 it. But is there any disagreement -- and I'm not
24 asking for three stipulation to it, but is there any
25 disagreement on your own end that the documents that

1 were produced in response to the subpoena, the removal
2 list, the invoices, are authentic business records?

3 MR. HAYES: There's no objection. But what we
4 sent you is what we had, and they are business records
5 that are kept in the ordinary course of business that
6 WestFax relies upon and hasn't had any complaints.

7 MR. COHEN: I understand. Thank you.

8 Q. (BY MR. COHEN) If I'm not asking you a
9 question about one of these, it's shortening it up. So
10 I'm trying to do that, sir.

11 Sir, if you would take a look at Exhibits 7
12 and 8. And the reason I was drawing these to your
13 attention is because if you look at Exhibit 7, both on
14 the apparent received fax with an invite code that
15 corresponds to the billing code on the WestFax invoice
16 of R8567F15, and then you look at Exhibit 8, the invite
17 code on the fax is the same. The billing code on the
18 WestFax invoice in Exhibit 8 is the same, except it's
19 got the capital letters O-N at the end. I was
20 wondering what significance to a billing code on a
21 WestFax invoice having the word O-N might mean or the
22 letters O-N after the billing code?

23 A. There's no significance. I don't know. It's
24 not provided by WestFax.

25 Q. In the invoice on Exhibit 7, before the

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1 billing code, it's got the word "splitfile-2." In
2 WestFax invoices, what does it mean when we see the
3 term "split file"?

4 A. I don't know.

5 Q. Is there somebody at WestFax who has something
6 to do with creating the billing invoices who might be
7 able to explain the significance of that?

8 A. No.

9 Q. On Exhibit 12, we have the fax as a cover page
10 and a WestFax invoice as the next three pages. And
11 then we have some e-mails and e-mail attachments. And
12 it starts, I believe, at the last page where Ms. Jensen
13 at usa.m3 is communicating with Ms. Gasseling. And she
14 says, "I submitted a rather large database for R9666
15 fax request." And she goes on to ask how long it's
16 going to take to go out.

17 And then Ms. Gasseling -- and this is on Bates
18 page USA010622 -- it says she can "split it 5 ways,
19 this just speeds up the merging time."

20 And Ms. Jensen says the "Test page looks
21 great. You are good to send."

22 And the conversation concludes with
23 Ms. Gasseling saying, "Great We will start queing [sic]
24 them now."

25 What does it mean in terms of the way

1 **WestFax's system works to -- when Ms. Gasseling is**
2 **saying, "We will start queing them now"?**

3 MR. POELL: I just want to object and
4 stipulate -- state for the record that Mr. Cohen read
5 parts of the e-mails. They weren't read verbatim, so I
6 just don't want there to be any confusion about whether
7 they were completely stated or not. So the documents
8 speak for themselves.

9 MR. COHEN: I agree.

10 A. So I can't speak to the specific term of
11 queuing, but I can tell you that it seems to, in
12 general, be sending the broadcast order.

13 Q. (BY MS. COHEN) And when you use the phrase
14 "sending the broadcast order," sending it where or to
15 whom?

16 A. The recipients.

17 Q. Okay. So it's actually the broadcast going
18 out?

19 A. Yes.

20 Q. I understand that you've indicated you're not
21 a computer programmer, but then you participated in the
22 development of the programming and the software that
23 goes into the proprietary technology which provides the
24 WestFax broadcasting services to its customers. Given
25 your involvement at the time, the people who were

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1 involved, at your request, in developing it, and your
2 experience over the years working with it, have you had
3 an opportunity -- an adequate opportunity to assess its
4 reliability and the accuracy of the results it
5 generates in terms of distinguishing between successful
6 sends and fails and being able to recognize the data
7 and accurately record that and reflect that?

8 MR. POELL: I'm just going to object to form.

9 A. Are you trying to ask me if I look at our
10 system to ensure that it works correctly?

11 Q. (BY MR. COHEN) And if you've done it enough
12 that you feel you have an adequate basis to say, "Our
13 system works correctly and it generates reliable
14 information."

15 A. Our system works correctly.

16 Q. And is the information it generates reliable?

17 A. Yes.

18 Q. And if I understood something you told me
19 earlier, the generation by your system of the data
20 about what it did is contemporaneous and it's
21 automated. So when it talks -- when the system talks
22 about how many successful sends there were on a
23 broadcast, that's automatically generated by the system
24 at the time that it's accomplishing that, correct?

25 MR. POELL: Objection; form. Objection;

1 vague, confusing.

2 THE DEPONENT: Well, you're not the only one
3 that's confused.

4 A. Our system works correctly. I don't really
5 understand what you're trying to ask me.

6 Q. (BY MR. COHEN) If your customers were to ask
7 you before they agreed to pay you for a broadcast
8 whether they could rely on the information you give
9 back to them in reports about successful sends, fails,
10 the numbers corresponding to successful sends, if your
11 customers wanted you to assure them before they hired
12 you to do it that your system generated reliable
13 information, do you have any enough information to look
14 at your customers and tell them, "Yes, it does"?

15 MR. POELL: Again, objection. Form.

16 A. Our system provides reliable information.

17 Q. (BY MR. COHEN) Thank you, sir.

18 Sir, if you'll look at Exhibit Number 17.

19 This has a WestFax invoice, the first three pages.

20 MR. POELL: Just hold on for a second. Sorry.
21 Proceed.

22 Q. (BY MR. COHEN) And then it's got e-mails.
23 And there is a document behind the e-mails that is
24 Bates labeled M3 USA008811. And it says "Document
25 Produced in Native Form [sic]." And then it's got that

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1 same Bates referencing page at the top of the next page
2 with a list of people and what appear to be phone
3 numbers. If -- is this the kind of information that if
4 provided as a list in native form by a customer to
5 WestFax, the system can do a merge and send out a fax
6 broadcast individualized to people?

7 MR. POELL: Objection; form. Objection;
8 foundation.

9 A. I have no idea what this is. I mean, it looks
10 like it's a database.

11 Are you asking me if we can do a custom merge
12 application, as I previously testified to?

13 Q. (BY MR. COHEN) With this kind of information
14 as a -- as a database is, yes.

15 A. I don't know what this is.

16 Q. Well, assume that it comes in a data format
17 and these are fields. Can your system then extract
18 from those fields?

19 MR. POELL: Objection. Foundation.

20 Q. (BY MR. COHEN) To do a customized broadcast?

21 MR. POELL: Same objection.

22 A. Yeah. I wouldn't say that our system is
23 extracting from the data fields. Data fields are
24 provided by the customer.

25 Q. (BY MR. COHEN) What would you say your system

1 does with the information in the data fields to
2 accomplish the fax broadcast?

3 A. It merges the date fields into the document.

4 Q. And if this kind of data that we see on the
5 Document 08811 selection, if this kind of information
6 were provided in data fields and uploaded to your
7 system by the customer, would your system be able to
8 utilize this data and these data fields to do a merged
9 broadcast?

10 MR. POELL: Objection; form. Objection;
11 vague.

12 A. If formatted correctly, I suppose.

13 Q. (BY MR. COHEN) I -- I understand you
14 indicated you're the owner of WestFax. Are you also
15 the president?

16 A. Yes.

17 Q. Have you held that position since the
18 company's inception in approximately 1999?

19 A. Yes.

20 Q. And in your capacities as owner and president,
21 have you become knowledgeable and experienced with the
22 computer electronic programming and software technology
23 used in all facets of WestFax's business activities?

24 A. To the best of my knowledge.

25 Q. The documents produced by your lawyer in

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1 **response to the subpoenas in this case, were those true**
2 **copies of records that were generated in the ordinary**
3 **course of business and kept by WestFax as business**
4 **records?**

5 A. We produced business records that we use in
6 the ordinary course of business.

7 Q. And were you or the person who produced those
8 the authorized custodian of those business records?

9 A. Yes.

10 Q. Am I correct that WestFax does not have any
11 role in deciding what images will be used for the fax
12 broadcasting and it does not have any role in deciding
13 what facsimile numbers are sent faxes for its
14 customers?

15 MR. POELL: Objection. Compound.

16 A. WestFax does not have any involvement with the
17 document or the database.

18 Q. (BY MR. COHEN) Paragraph Number 12 of the
19 subpoena seeks "Any and all contracts with vendors who
20 may have provided services for fax transmissions sent
21 on behalf of or at the direction of M3 and/or MDLinx."
22 And your response in Exhibit Number 2 to paragraph
23 Number 12 of the subpoena reads, "Any contract WestFax
24 may have with its vendors is confidential and
25 privileged information that WestFax will not provide."

1 What -- I'm stepping back from the request.
2 I'm not waiving it, but for the purposes of this
3 question, I'm stepping away from the request for the
4 contract, and I'm not asking you the content of the
5 contract at this time. But there's no reason to fight
6 about something if there is nothing.

7 Is WestFax aware of the existence of any
8 contracts with vendors who may have provided services
9 for fax transmissions sent on behalf of or at the
10 direction of M3 or MDLinx?

11 A. Are you asking me if they used other companies
12 to do fax broadcasting?

13 Q. Well, I'm not certain what the meaning of
14 "vendors" is in our paragraph Number 12 or your answer
15 to paragraph Number 12. So I'm trying to figure out
16 what everybody's talking about when they reference
17 vendors that might be providing services for fax
18 transmissions on behalf of or at the direction of M3 or
19 MDLinx. But you're then referencing in your answer,
20 "Contracts WestFax may have with its vendors." So I
21 don't know -- I didn't write the original Question 12,
22 but I also didn't write your answer.

23 Were there any contracts between WestFax and
24 vendors in any way related to or involved with M3 or
25 MDLinx?

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1 MR. POELL: And I'm just going to object;
2 vague. And I'm going to speak for just a quick second.
3 And how is he supposed to know what you mean by
4 "vendors" if you yourself don't know what you meant by
5 "vendors" in your subpoena rider?

6 MR. COHEN: I'm using what he meant when he
7 said WestFax's and he described it as "its," meaning
8 WestFax's vendors.

9 MR. POELL: Right. But my understanding was
10 that you just said that you didn't write this request
11 and you weren't sure what -- what plaintiffs meant by
12 "vendors" in the subpoena rider. So I'm just trying to
13 clarify what are we talking about when we mean
14 "vendors"?

15 MR. COHEN: With that clarification, fair
16 enough. Since --

17 MR. HAYES: Well, let me interrupt very
18 briefly. So, Dan, what you're saying is you're
19 stepping away from this question. You're asking your
20 own question?

21 MR. COHEN: I am, and I'm asking a question
22 about what he meant in his sentence when he says, "Any
23 contract WestFax may have with its vendors is
24 confidential and privileged information that WestFax
25 will not provide."

1 A. Okay. Let me just answer it. Yeah. So we
2 have relationships with vendors, and that's
3 confidential.

4 THE VIDEOGRAPHER: Counsel, we have about two
5 minutes for media change.

6 MR. COHEN: Let me ask one quick question, and
7 you'll get it.

8 **Q. (BY MR. COHEN) Were any such vendors --**
9 **without asking who they are, what they were, or what**
10 **the contracts provided, were any such vendors in any**
11 **way at any time involved in anything relating to M3 or**
12 **MDLinx?**

13 A. I don't know. I mean, there -- we have
14 vendors, and those vendors are confidential. So I --
15 there's not anyone else, that I know of, that is
16 involved with sending the fax.

17 MR. COHEN: We can go off the record.

18 THE VIDEOGRAPHER: This is the end of Media
19 Unit 1. We are going off the record. The time is
20 12:11.

21 (Recess from 12:11 p.m. until 12:22 p.m.)

22 THE VIDEOGRAPHER: This is the beginning of
23 Media Unit Number 2 in today's 30(b)(6) testimony of
24 Barry Clark. We are back on the record. The time is
25 12:22.

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1 MR. COHEN: We're back in the record. In the
2 interest of not taking up Mr. Clark's time fruitlessly,
3 we discussed off the record that Mr. Hayes had
4 delivered to both counsel at or about the same time, by
5 electronic transmission, large volumes of documents or
6 information, one of them being a removal list and one
7 of them being a set of invoices. And the idea was that
8 the witness knows what he sent. But if I show him back
9 what he was sent, he just has to trust me that I'm
10 showing him what I sent him or what he originally sent
11 me and -- or look through it.

12 And so to try to avoid that, I think we have
13 an agreement. Counsel is not waiving any objection to
14 foundation to business record status. But just in
15 terms of what records we're talking about that the
16 witness is purporting to lay foundation for and
17 authenticating, we're agreeing that the records that
18 were mutually produced to both of us by Mr. Hayes are
19 the records the witness is talking about.

20 MR. POELL: Agreed.

21 MR. COHEN: Okay.

22 **Q. (BY MR. COHEN) Mr. Clark, the removal lists**
23 **that your counsel provided to us on your behalf and**
24 **your response to the subpoena and the large volume of**
25 **invoices that your counsel provided to us on your**

1 **behalf, were those -- was the information contained in**
2 **those documents and those documents themselves**
3 **information that was generated at or about the time of**
4 **the matters or events described in the documents either**
5 **by people with personal knowledge of the truth of the**
6 **information or by an automated system, which would**
7 **ensure its accuracy, and was all that information in**
8 **those materials maintained within the custody of**
9 **WestFax, preserved and created and maintained in the**
10 **ordinary course of business, and delivered to us in its**
11 **accurate form?**

12 A. The business records we provided were
13 accurate. We have had sole custody of those, to the
14 best of my knowledge, and they are true and accurate.

15 Q. Thank you very much, sir.

16 I wanted to go back, just for a moment, to
17 what we were talking about when we had to change tapes.
18 And you've made it clear to me there are things you'll
19 tell me, there are things you won't. If I want to find
20 out, I can try and go to a judge and get an order, but
21 I want to try as best I can to even understand what I'm
22 asking about. What -- if I go to a judge right now and
23 I tell him you wouldn't tell me about vendors, he's
24 going to say, "Vendors who do what?"

25 And so I need to at least try to figure out

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1 the outline of what we're even talking about, without
2 you disclosing the things that are -- you're refusing
3 to disclose. I need to get as much information as
4 you'll let me have. And you'll -- as you've shown,
5 you'll define where that line is. But I'm going to try
6 with a few questions. Okay?

7 What -- without -- without identifying any
8 particular vendor or as to any particular customer, as
9 to any particular broadcast, what kind of thing would a
10 vendor do in -- in contractual cooperation with WestFax
11 to promote or facilitate WestFax's operations?

12 I just don't understand what we're even
13 talking about when we talk about a vendor of WestFax.

14 MR. HAYES: Again I'm going to object. I
15 don't mean to be difficult, but as soon as you start
16 into the road as to how WestFax does its fax
17 broadcasting, even by saying who it does its -- who it
18 may have relationships with, you're stepping inside
19 what WestFax protects as being proprietary.

20 So there's not really a way to be a little bit
21 pregnant in these types of things. We have
22 consistently tried to answer what we did for a
23 particular customer, but tried to stay away from how we
24 did it and with who we did it and what types of
25 services those persons may have provided, because it's

1 -- it is very possible to reverse engineer that
2 information once it becomes public. And that could
3 compromise the way WestFax does business and its
4 competitive advantage.

5 THE DEPONENT: I want to take one step --

6 MR. HAYES: Yeah.

7 THE DEPONENT: -- in deference to your advice.

8 A. If I were to answer your question as you've
9 asked it, Mr. Hayes would be a vendor of WestFax in the
10 normal course of business. We have a landlord that we
11 pay rent to that would be a vendor in the normal course
12 of business. There are lots of people that contribute
13 to the operation of WestFax as vendors.

14 Q. (BY MR. COHEN) Without asking you who --

15 A. Go ahead.

16 Q. Okay. Without asking you -- and I'm not
17 talking about the types of vendors you just described.
18 Without asking you who any vendor is or exactly what
19 role they fill or how they fulfill it, can you tell me
20 whether with regard to M3 and MDLinx there was any
21 vendor that served as an intermediary between them and
22 WestFax or any vendor that -- other than WestFax
23 itself, that contributed to the actual accomplishment
24 of the fax broadcasts paid for by M3 and MDLinx?

25 A. I'll defer to my attorney's advice on that.

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1 MR. HAYES: The short answer is no. It's
2 just --

3 MR. COHEN: No, he can't tell me?

4 MR. HAYES: He can't tell you. The short
5 answer is, is that intermediary or assisted not only is
6 a little bit nebulous, but the provision of the fax
7 broadcasting services presumably uses vendors that you
8 could -- you could assume that would be in -- necessary
9 in order to accomplish a fax broadcast. But as soon as
10 you get past that point -- and we've had this
11 discussion for seven, eight, nine, ten years -- as soon
12 as you get past that point, you just -- you ring a bell
13 that maybe you wish you wouldn't have rung.

14 THE DEPONENT: And I honestly -- and I can say
15 this to you and to the judge and whoever might see this
16 -- I don't really understand what you're getting at.

17 MR. HAYES: But -- but I do. I understand
18 what you're trying to say. But I'm just saying that
19 that package is what we have put a wrapper around and
20 says it's proprietary.

21 **Q. (BY MR. COHEN) Does WestFax have any contract**
22 **with any companies that provide the telephonic**
23 **services -- the telephone service that allows the fax**
24 **broadcasts to go out to the recipients?**

25 A. That's proprietary.

1 MR. HAYES: Let me just interject for a
2 second. Mr. Clark is right about the services that
3 those telephone companies provide is proprietary and
4 how they do it. But WestFax does have one or more
5 telephone carriers.

6 MR. COHEN: But I assume the identity would be
7 something you would not disclose?

8 MR. HAYES: We have not disclosed. Not
9 personal to you, Dan. We just have never disclosed
10 that, to my knowledge.

11 MR. COHEN: I understand. And I'm not trying
12 to waste any time. If I ask him, he'd say no. You'd
13 instruct him not to answer?

14 MR. HAYES: Right.

15 MR. COHEN: Obviously, we've had a lot of
16 disagreements as to what is or is not subject to proper
17 discovery in the course of this deposition. Except to
18 the extent that we had to bicker a little bit, I tried
19 to get through what I could. For the record, I reserve
20 the right to try and present these things to the court,
21 get rulings. Whatever comes of those rulings, maybe
22 we'll see each other again; maybe we don't. But
23 reserving that right, I don't have any further
24 questions at this time.

25

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1 EXAMINATION

2 BY MR. POELL:

3 Q. Mr. Clark, I just have a couple of questions.
4 I'll just reintroduce myself to you. My name is David
5 Poell. I'm the attorney for M3 USA Corporation, which
6 is the defendant in this matter and, of course, at one
7 time at least, was a customer of WestFax. My questions
8 are going to primarily relate to just document
9 retention-policies of WestFax. So just give me one
10 moment here.

11 Mr. Clark, in your capacity as a corporate
12 representative of WestFax, to your knowledge, is M3
13 still a customer of WestFax?

14 A. They are not an active customer, no.

15 Q. And could you explain what you mean by "active
16 customer"?

17 A. To my knowledge, they no longer send fax
18 broadcasts with WestFax.

19 Q. Okay. And what is the basis for your
20 statement that they no longer send fax broadcasts?

21 A. We looked to see if they did, and they don't.

22 Q. And could you tell me what, I guess, records
23 or business records you examined to make that
24 determination?

25 A. Our accounting file.

1 **Q. So based on your review of your accounting**
2 **file, that's how you've come to the conclusion that**
3 **WestFax no longer sends faxes on behalf of M3?**

4 A. Yes.

5 **Q. Do you know when the last time was that**
6 **WestFax would have sent faxes on behalf of M3?**

7 A. I know that we've provided that in -- in
8 answer to some questions. But I believe it was 2015,
9 but I don't have the exact date.

10 **Q. I'll just --**

11 MR. HAYES: Again, if I can help out. It
12 appears that the information I've provided to Mr. Clark
13 shows the last fax was June 2nd, 2016.

14 THE DEPONENT: I'm sorry. Thank you.

15 MR. POELL: And I'll get to some -- we can --
16 we can establish that through his testimony as well.

17 MR. HAYES: Okay.

18 MR. POELL: Maybe it's just easier to go -- to
19 reference the invoices.

20 **Q. (BY MR. POELL) Now, Mr. Clark, pursuant to**
21 **our stipulation, I'm going to make some references to**
22 **WestFax's document production to the subpoena, which**
23 **consisted of over 1100 pages of invoices generated by**
24 **-- as a result of M3's faxing activities during the**
25 **period in question.**

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1 Now, I'll represent to you, Mr. Clark, that
2 the date of the first invoice is January 2nd, 2015.
3 And my question is, you consider your -- you consider
4 WestFax's production of its invoices to be complete and
5 accurate based on a search of WestFax's business
6 records?

7 A. Yes.

8 Q. Okay. So would it be fair to say that you did
9 not have any invoices for WestFax prior to the date of
10 January 2nd, 2015?

11 A. To the best of my knowledge, no.

12 Q. And then, similarly, I'll represent to you
13 that based on WestFax's production pursuant to the
14 subpoena, the date of the last invoice is June 2nd,
15 2016. So would it be fair to say that WestFax does not
16 have any invoices for M3 after that date, June 2nd,
17 2016?

18 A. Yes.

19 Q. So just to conclude, the only invoices for
20 which WestFax has invoices generated by M3 are those
21 that were generated between January 2nd, 2015, and June
22 2nd, 2016. Is that correct?

23 A. Yes.

24 Q. And if there were any additional invoices
25 either generated prior to January 2nd, 2015, or

1 generated after June 2nd, 2016, those invoices would
2 have been found in the course of the search of your
3 business records, correct?

4 A. Yes.

5 Q. Okay. Now, I'm going to try not to be
6 repetitive of -- of Mr. Cohen's examination. So
7 apologies in advance if anything is repetitive. I
8 think we'll be able to take these last points
9 relatively quickly.

10 Now, just to -- to be clear, all of the
11 records that WestFax produced pursuant to the subpoena,
12 which includes the invoices we just discussed as well
13 as the opt-out removal list, to the best of your
14 knowledge and in your capacity as a corporate
15 representative, there are no other business records
16 stored in the ordinary course of business relating to
17 M3 or MDLinx; is that correct?

18 A. To the best of my knowledge, that's correct.

19 Q. Mr. Clark, does WestFax maintain any data
20 listing the fax numbers to which M3 sent faxes during
21 this period in question?

22 A. No.

23 Q. What type of data, if any, does WestFax
24 maintain in the regular course of business with respect
25 to faxes sent by its customers aside from invoices and

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1 **opt-out removal lists?**

2 A. There's none.

3 **Q. So would it be fair to say that for M3,**
4 **specifically, there are no other records relating to**
5 **them aside from those documents we just mentioned, the**
6 **invoices and the removal list?**

7 A. Yes.

8 **Q. Okay. I believe it was your testimony, but**
9 **just to be clear, does WestFax retain images of faxes**
10 **that were sent by its customers in the regular course**
11 **of business?**

12 A. No.

13 **Q. And so would it be fair to say that WestFax**
14 **does not retain images of any faxes sent by M3 during**
15 **the period in question; is that correct?**

16 A. Correct.

17 **Q. We talked a little bit earlier about how a**
18 **customer, including M3, prior to using WestFax's**
19 **services would either upload a spreadsheet to WestFax**
20 **or, alternatively, it'd send a spreadsheet to a WestFax**
21 **employee and instruct them to send faxes on M3's**
22 **behalf. Is that a fair summary of your testimony?**

23 A. I would make a distinction that we're not
24 sending them, necessarily, on M3's behalf. M3 is still
25 sending them. Our customer service representatives are

1 simply helping them with that transmission.

2 Q. Okay. But it -- just so I'm clear. It could
3 be the case that -- strike that.

4 When a customer, like M3, sends faxes using
5 WestFax portals, typically, it's the case that they
6 have to use a fax list that they upload prior to
7 sending the fax; is that correct?

8 A. Yes, that's correct.

9 Q. Okay. Does WestFax maintain copies of fax
10 lists that are used by customers to send faxes?

11 A. No.

12 Q. Does WestFax maintain any fax lists that were
13 used or uploaded by M3 to send faxes?

14 A. No.

15 Q. If a customer does upload a fax list to
16 WestFax's portal prior to sending it, what happens to
17 that fax list after the faxes are actually sent?

18 A. The customer can -- the customer can manage
19 those lists on the portal, but their -- WestFax doesn't
20 maintain that data.

21 Q. So WestFax does not have those fax lists
22 stored in the ordinary course of business?

23 A. Not for M3 data, no.

24 Q. Okay. So would it be fair to say that WestFax
25 does not have any fax lists that were used by M3 to

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1 **send faxes during the period in question?**

2 A. Correct.

3 **Q. Does WestFax maintain any reports internally**
4 **that summarize the success or failure rate of**
5 **transmissions that were sent by its customers?**

6 A. We don't maintain reports, no.

7 **Q. Okay. So would it be fair to say that WestFax**
8 **does not have any reports generated in the ordinary**
9 **course of business that summarize how many faxes were**
10 **sent by M3 during the period in question?**

11 A. No. We do not have that data.

12 **Q. Okay. In your capacity as a corporate**
13 **representative, does WestFax know how many faxes M3**
14 **sent using WestFax during the period in question?**

15 A. Yes. We do know.

16 **Q. And how many faxes is that?**

17 A. Well, we would have to add them up on the
18 invoices, but I don't know that number off the top of
19 my head. But that number could be obtained.

20 **Q. And just so I'm -- I'm clear. When we're**
21 **talking about faxes sent, are we talking about**
22 **successful transmissions sent?**

23 A. Yes.

24 **Q. Okay. And just to stay on that topic for a**
25 **second here. Earlier there was some testimony when we**

1 were discussing the content of the invoices themselves,
2 and I just want to make sure we're clear on this point.
3 I'll represent that all the WestFax invoices are
4 identical in format insofar as they all list the
5 account number, the date, the invoice number, as well
6 as the item description and the quantity.

7 And, Mr. Clark, I believe you testified that
8 the "Quantity" column represents all those faxes that
9 were -- actually, strike all of that.

10 Could you just testify, one more time -- and
11 I'll just direct your attention to Exhibit 17 for
12 present purposes.

13 MR. COHEN: I object to you using my exhibit.
14 Just kidding.

15 Q. (BY MR. POELL) So on Exhibit 17, in the
16 "Quantity" column, it says 14,035.0. Do you see that?

17 A. Yes.

18 Q. Okay. Now, what does that number, 45 --
19 14,035 represent?

20 A. This is an incredibly important distinction.
21 What this presents is the number of fax machines or fax
22 servers or other types of fax-receiving devices that
23 actually received the fax. That has absolutely no
24 correlation to whether or not the intended recipient
25 received the fax in question.

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1 There are several different ways that you can
2 receive a fax. A very common way of receiving a fax is
3 as an e-mail attachment. The proliferation of what's
4 called fax to e-mail is very significant in the sending
5 of fax transmissions in modern society. And there's a
6 very important distinction as to whether or not the
7 intended recipient actually received the fax or
8 somebody else received the fax.

9 **Q. Okay.**

10 MR. COHEN: Before you go on, I just want to
11 object to the extent the witness's answer by reference
12 to important distinction seems to be making a statement
13 of relevant distinction of law. And because I think
14 that's an incorrect statement of law, we would object
15 to it and move to strike.

16 THE DEPONENT: I'm simply stating the
17 technology, with no reference to the law.

18 MR. POELL: I -- I object to opposing
19 counsel's request to strike Mr. Clark's testimony on
20 that point.

21 MR. HAYES: And, David, may I interject? What
22 has been a question that Mr. Clark's been asked in the
23 past I think is the most relevant.

24 Mr. Clark, with respect to the summary
25 invoices, is it my understanding that WestFax quantity

1 reflects its agreement with the customer to bill those
2 on the basis of the faxes that WestFax's platform shows
3 that the fax was transmitted to them -- to the other
4 machine; in other words, there was a tone and a
5 handshake?

6 THE DEPONENT: Yes.

7 MR. HAYES: And is that the basis for which
8 WestFax bills its customer?

9 THE DEPONENT: Yes.

10 MR. HAYES: And is -- is that reflective of
11 the quantity that -- of the people that -- of the fax
12 recipients that accomplished that task?

13 THE DEPONENT: Yes.

14 MR. HAYES: Okay.

15 MR. POELL: Thank you, Mr. Hayes.

16 **Q. (BY MR. POELL) So, Mr. Clark, not to belabor**
17 **it too much, but just so everyone -- so it's clear for**
18 **the record. The "Quantity" column, that does not**
19 **represent the number of recipients who actually**
20 **physically received a fax transmission; is that**
21 **correct?**

22 A. That's correct. We have no way of knowing
23 that. Technology does not allow us to make that
24 distinction.

25 **Q. Thank you.**

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1 **And in the ordinary course of business, does**
2 **WestFax maintain any data listing the fax numbers of**
3 **all intended recipients of faxes sent by -- sent by**
4 **WestFax customers?**

5 A. I'm sorry. You lost me in that question.

6 Q. Okay. I'll rephrase.

7 **Does WestFax, in the ordinary course of**
8 **business, maintain any records listing the fax numbers**
9 **of intended recipients?**

10 A. WestFax does not maintain fax records of
11 intended recipients.

12 Q. So is there any way for WestFax to determine,
13 through searching its business records, the number of
14 unique fax numbers to which M3 sent faxes during the
15 period in question?

16 A. WestFax is not able to determine by our
17 business records how the specific recipients of the
18 faxes that were sent to M3 customers or attempted
19 recipients.

20 Q. Okay. So there's no list, there's no Excel
21 spreadsheet listing the fax numbers of the intended
22 recipients to which M3 sent faxes; is that correct?

23 A. That's correct. There's not a list.

24 Q. Okay. And does WestFax have, in the ordinary
25 course of business, any records showing the names of

1 the subscribers of the fax numbers to which M3 sent
2 faxes?

3 A. No.

4 Q. So just again on the -- on the "Quantity"
5 column of the invoice -- and again, we'll just use
6 Exhibit 17 as an example -- where it says "14,035," is
7 it possible that while the "Quantity" column says four
8 thousand -- 14,035 -- excuse me -- would it be possible
9 that 14,035 unique individuals did not actually receive
10 the fax transmission?

11 MR. COHEN: Before you answer, I object to the
12 term "receive" as being vague and ambiguous in the
13 context of all of the testimony that's gone before.

14 Subject to that, if you know what it means, go
15 ahead and answer.

16 A. I do know what it means. And there -- it --
17 yes, you can make a determination that 14,035 faxes
18 have -- have given us a tone that indicates that a fax
19 was received. But that doesn't -- so, yeah.

20 Q. (BY MR. POELL) But that number does not
21 necessarily reflect whether the intended recipient
22 actually picked up that fax and physically looked at
23 that fax?

24 A. That's true.

25 Q. I just have a couple questions about the

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1 **opt-out services.**

2 **Now, in the regular course of business, does**
3 **every WestFax customer have to sign up for opt-out**
4 **services?**

5 A. No.

6 Q. And I guess I should preface that with when we
7 mean "opt-out services," I mean customers have the
8 ability -- strike that.

9 When we say "opt out," I mean fax recipients
10 have the option of calling a number and informing
11 WestFax that they would no longer like to receive fax
12 transmissions sent by one of WestFax's customers; is
13 that correct?

14 MR. COHEN: Before you answer, I just want to
15 object to the use of the term "no longer" in that it
16 assumes facts not in evidence; namely, that the
17 customers previously wanted to and now no longer want
18 to.

19 Subject to that, you can go ahead and answer.

20 Q. (BY MR. POELL) Let me rephrase.

21 Mr. Clark, could you describe WestFax's
22 opt-out services?

23 A. Yes. A customer may decide that for
24 convenience sake, they would like to have an opt-out
25 number that would enable someone -- a -- a recipient or

1 anyone; it doesn't have to be a fax recipient, it can
2 be anyone that calls the number -- can enter a
3 ten-digit phone or fax number that would be suppressed
4 from future faxes via an automated service.

5 Q. Okay. And based on your review of WestFax's
6 business records, did M3 sign up for opt-out services
7 as you've just described?

8 A. Yes.

9 Q. I'm going to refer, just briefly, to -- it
10 could really be any of the exhibits that have a fax on
11 them. We'll just take --

12 A. This is 17.

13 Q. I don't think that has -- do you have 12 with
14 you?

15 A. Yes.

16 Q. Now, at the bottom of Exhibit 12, the first
17 page of Exhibit 12, there's a line that says, "If you
18 would like your fax number removed, please call
19 800.222.9268 or fax 215.689.3706."

20 Do you see that?

21 A. Yes.

22 Q. So based on your prior testimony, is it your
23 understanding that if somebody who received this fax,
24 Exhibit 12 of this deposition, if they no longer wanted
25 to receive faxes sent by M3, they would have to call

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1 **either that telephone number or send a fax to the**
2 **designated fax number?**

3 MR. COHEN: Before you answer, same objection
4 to the presupposition assuming facts not in evidence as
5 to quote, unquote, "no longer."

6 Subject to that, you can answer.

7 A. So I would say that that's not correct. I
8 would say perhaps a more precise description would be
9 that there are, presumably, several ways that they
10 could opt out, including calling the customer directly.
11 So -- but this is a mechanism for opt out. If somebody
12 received a fax and wanted to opt out of future faxes,
13 they could call this number to opt out.

14 **Q. (BY MR. POELL) Okay. And what happens if --**

15 A. If -- I'm sorry. Let me just rephrase.

16 **Q. Sure.**

17 A. I haven't verified that this is a number that
18 was provided by WestFax. So -- but I'll assume that it
19 is.

20 **Q. Okay.**

21 A. Sorry.

22 **Q. Totally all right.**

23 I'm then going to represent to you, Mr. Clark,
24 that the opt-out removal list which was provided by
25 your counsel pursuant to the subpoena that was served

1 by plaintiff's counsel, it has two columns. Column A
2 says "fax" and Column B is for "date added."

3 Now, I'll represent to you that this Excel
4 spreadsheet has a total of 45,639 rows. Of course, if
5 you exclude the first row, which designates fax and
6 date added, that would mean that there are 45,638 rows
7 of what appear to be ten-digit numbers in Column A, and
8 -- as well as a time stamp in Column B, which includes
9 the month, the day, the year, and what appears to be a
10 -- a time in a -- designated in military time.

11 MR. POELL: I just want to -- if we can have a
12 stipulation with plaintiffs' counsel and with WestFax's
13 counsel that I've accurately described the content of
14 the removal list.

15 MR. COHEN: I have no reason to doubt your
16 calculation. But I can't stipulate to it because I
17 never calculated the number of individual lines.

18 MR. POELL: Well, you can look at it right
19 here.

20 MR. HAYES: I think that -- again, what we
21 sent you was accurate and complete. What it is is what
22 it is. So I think we should stipulate that whatever we
23 sent you speaks for itself.

24 MR. COHEN: And I agree with that, and I don't
25 intend to create obstructions. But I want to look at

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1 it in my own Excel thing. But I'm not -- I'm not going
2 to challenge a mathematical reality.

3 MR. POELL: Understood. I think that should
4 suffice for our present purposes.

5 Q. (BY MR. POELL) Now, Mr. Clark, assuming, as
6 we've just stipulated, that this spreadsheet contains
7 45,638 lines of ten-digit numbers and corresponding
8 dates, is it correct to say that -- well, I guess my
9 question to you would be what exactly -- what is the
10 type of information that is represented on this
11 spreadsheet?

12 A. Well, without -- I mean, I'm assuming that
13 it's the removal list. So it's a number that has been
14 added to a removal list and the date and time.

15 Q. Okay. And what would be the mechanism by
16 which WestFax would acquire this data and then add that
17 data to this list?

18 A. It's important to note that the data is always
19 in complete control of the customer, in this case M3.
20 But it -- there -- the file can be appended by somebody
21 calling the number. It can be appended by a customer
22 uploading data to the file as well. So it can -- but
23 those are the most common mechanisms.

24 Q. Does this opt-out list include every single
25 fax number that requested not to be faxed by M3 during

1 **the time period?**

2 A. As far as I know, yes.

3 **Q. Would there be any reason to believe that --**
4 **if somebody opted out and requested not to receive**
5 **additional faxes from M3, is there any reason why their**
6 **fax number would not appear on this list?**

7 A. No, not that I can think of.

8 **Q. So if somebody utilized WestFax's opt-out**
9 **services and made a request through WestFax not to**
10 **receive faxes from M3, that fax number would appear on**
11 **this removal list, correct?**

12 A. It -- correct, with a couple of important
13 distinctions. I mean, the customer always has control
14 of the data. So that in this case, M3 is the person
15 that is dictating how that list is appended.

16 **Q. But based on your -- your records search of**
17 **WestFax's business -- business records, these are all**
18 **the opt-out numbers that you were able to locate in the**
19 **course of that search?**

20 A. Yes.

21 MR. POELL: I think I'm done. Just give me
22 one second here.

23 MR. COHEN: I just have a few follow-ups, just
24 so you know.

25 MR. HAYES: Do you want me to give you a ride

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1 back?

2 THE DEPONENT: Sure. Thank you.

3 MR. COHEN: I thought we'd do Uber together.

4 MR. HAYES: Yeah, but he's not going to the
5 airport.

6 MR. POELL: That's all I have.

7 EXAMINATION

8 BY MR. COHEN:

9 Q. Mr. Clark, I'll try to be very brief about
10 this.

11 There's a -- a non sequitur that it could just
12 be my not understanding the way this works. M3's
13 counsel just went through with you earlier in his
14 questioning about the book-ended dates when M3 used
15 WestFax's platform to send its fax broadcasts. And I
16 believe it was January 2nd of 2015 through June 2nd of
17 2016. But then he also had questions for you more
18 recently about what we see on the opt-out removal list
19 produced by WestFax for the opt-out number assigned by
20 WestFax to M3 at M3's request.

21 And what I'm seeing -- and I'm just skimming
22 through -- I see dates for opt out in 2014, 2012, 2011,
23 and 2009. And rather than throw suspicions at you and
24 say, "Is this what's going on," I'll just ask you what
25 -- if you have an explanation for why the M3 opt-out

1 removal list for the opt-out number assigned by WestFax
2 to M3 has opt-out dates when they became part of the
3 opt-out list that span years well before the January
4 2nd, 2015, date, which is the only -- the earliest
5 record that WestFax has of broadcasting activity with
6 M3. Is -- do you have an explanation for that?

7 A. Well, there are several ways that -- I -- I
8 don't have a general explanation, but I can tell you
9 that, specifically, people can -- so for -- for a fact
10 -- a date that might appear after, they could certainly
11 call the number after or M3 could call the number
12 after. They could have also provided us with data
13 prior to their using us that said that these are people
14 that we don't want to fax. So there -- I don't know
15 why there would be a date prior to the first broadcast.

16 Q. And I appreciate that. What I want to ask
17 you, if it's possible -- I'm not saying it is -- I'm
18 asking you is it possible that because of the way
19 WestFax stores data, the way WestFax deletes data, that
20 is it possible WestFax participated in providing fax
21 broadcasting services to M3 or MDLinx before January
22 2nd, 2015, but WestFax simply doesn't have -- any
23 longer have available records of that?

24 A. I don't think so.

25 Q. Why do you say that?

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1 A. Because we searched our records and found --
2 and produced what we found.

3 MR. HAYES: Again, we can look again. I'll
4 look again and let you know.

5 MR. COHEN: And I appreciate that. And -- and
6 that's -- I'll take you up on that. I'm never going to
7 turn down an offer.

8 Q. (BY MR. COHEN) I'm just -- and I'm being very
9 **serious about this. We talked earlier about the way**
10 **stuff is deleted off your system, that you don't need**
11 **it anymore, that it takes up room, that you want to**
12 **make more space. When I wanted to get into more**
13 **detail, you didn't -- you refused to answer. I'm not**
14 **arguing with you about that. I'm just saying since I**
15 **didn't get to go into detail with you about how, when,**
16 **and why you delete --**

17 A. I answered those questions. I disagree with
18 your characterization. But go ahead.

19 MR. HAYES: Well, let's leave it at this, so
20 we can -- if there are some invoices that we didn't
21 produce for MDLinx through inadvertence, we'll go back
22 and look and produce them. We don't have any qualms
23 about whether they were deleted. And if they're there,
24 we'll give them to you. First pass, we did a careful
25 search; that's what we found.

1 MR. COHEN: I -- I don't think I can really --
2 under this current state of the record -- push either
3 one of you more on that right now.

4 MR. HAYES: Okay.

5 MR. COHEN: There are some things we need to
6 take up.

7 THE DEPONENT: Okay.

8 MR. COHEN: But we can do that later.

9 Q. (BY MR. COHEN) I guess one thing I wanted to
10 check --

11 MR. COHEN: And since you didn't mention this,
12 I'm assuming we're all in agreement on this.

13 Q. (BY MR. COHEN) -- WestFax wouldn't assign an
14 opt-out number -- you know, a call-in number for a
15 recipient to become part of the opt-out list, wouldn't
16 assign that to Customer A for 2009 through June 2nd of
17 2015 and then that customer says, "I'm no longer a
18 customer and I'll never be a customer," and then
19 WestFax assigns that same number to new Customer B who
20 starts broadcasting January 2nd, 2015, and unbeknownst
21 to everybody, Customer B is carrying the last six years
22 of opt-out call-ins from Customer A's opt outs.

23 A. I'm not saying it would never happen. It
24 could happen, but it's unlikely. We certainly wouldn't
25 do it intentionally.

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1 Q. Sometimes when I get to sit and listen to the
2 question and answer, I hear things and I don't know
3 whether there's a significance to them.

4 M3's counsel was asking you questions about
5 whether there are any lists available, any this, any
6 that. And your question -- your answers to the
7 questions seemed very narrow to the fact that WestFax
8 and WestFax's business records would not have any of
9 those documents or any of that information. To your
10 knowledge, would any third party that has any
11 contractual relationship with WestFax have any such
12 information or documentation still accessible to it?

13 A. No.

14 Q. When we went through some of plaintiffs'
15 Exhibits 3 through 17 that had some WestFax invoices in
16 there -- and I understand you're looking at an invoice
17 out of nowhere, and you're saying, "It looks like ours
18 but I can't vouch for it." If, in fact, each of those
19 invoices came from what your attorney produced on your
20 behalf, would you agree that we can all reliably know
21 that those are genuine?

22 A. Yeah. I previously testified to and answered
23 it, yes.

24 Q. And we can take the information you gave us
25 earlier about how to interpret those specific WestFax

1 **invoices, and we can apply it to the big group that**
2 **your attorney produced to us?**

3 A. Sure.

4 Q. Last thing. We received from M3 some
5 **Bates-labeled documents. It's M3 USA006629, 6630, and**
6 **6631. And they are e-mails between one or more people**
7 **at M3 or MDLinx and one or more people at WestFax. And**
8 **what I'm looking at is an e-mail sent by somebody --**
9 **Jennifer Jensen, presumably, with either M3 or**
10 **MDLinx -- to the recipient Lisa Roe at**
11 **lisa@westfax.com.**

12 Do you recall that in the period of time,
13 **October 20, 2015, Lisa Roe was an employee of WestFax?**

14 MR. POELL: Just a point of clarification.
15 Are you offering this as an exhibit? I don't believe
16 it's been marked as an exhibit.

17 MR. COHEN: I don't have a paper copy. I got
18 it here by -- by e-mail.

19 MR. POELL: I mean, do we want to stipulate
20 that this is Exhibit 18, just so it's clear for the
21 record?

22 MR. COHEN: Yeah, we can -- we can do that.

23 MR. POELL: I don't think he has a copy of it.

24 THE DEPONENT: Okay.

25 MR. COHEN: And you know what? What I did was

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1 put it on the thumb drive and thought we'd mark that as
2 an exhibit. And then we didn't do that. But I have no
3 problem. We all know what these Bates-labeled exhibits
4 are. We can get that to the court reporter as 18.

5 MR. POELL: Sure. Okay.

6 (Deposition Exhibit 18 was marked.)

7 Q. (BY MR. COHEN) Do you know, was Ms. Roe an
8 employee of WestFax in that time period?

9 A. Yes.

10 Q. Does she still work for WestFax?

11 A. No.

12 Q. And the reason I was even inquiring about any
13 of this is because it's got -- at Bates page 6630, it's
14 got one of those order -- broadcast fax order things
15 that you and I talked about. We looked at one of my
16 exhibits. You said, "I really don't know what this is,
17 but this is coming from the customer." And it
18 indicates that it is attaching a document file, which
19 is a .doc format and then a database file, which ends
20 in an extension .xlsx. Do you know what format that
21 would be?

22 A. Excel.

23 Q. And I'll represent to you that the -- M3 then
24 produced to us in native form as the attached -- the
25 Excel attachment to that e-mail from --

1 A. Okay.

2 Q. -- they produced to us a list that had an
3 invitation code and a first and the last name and then
4 a fax number.

5 A. Okay.

6 Q. Assuming that I'm understanding what those
7 documents are and, say -- we'll end up getting to take
8 depositions of M3 people to see if I know what I'm
9 talking about, but if that's what that was, an e-mail
10 from somebody at M3 or MDLinx to Ms. Roe at WestFax
11 around that date attaching this Excel file containing
12 the information of the type I showed you in the fields,
13 would that be the kind of database of information in a
14 format that the WestFax platform can then use to send
15 out a customized merged broadcast?

16 MR. POELL: I'm just going to object on form
17 and vagueness.

18 A. I suppose it could. I'd have to look,
19 specifically, at the more detailed information.

20 MR. COHEN: Subject to the reservation from
21 before, I thank you for your time, sir. I have nothing
22 further.

23 THE DEPONENT: Thanks.

24 THE VIDEOGRAPHER: No questions?

25 This is the end of Media Unit Number 2 and

Comprehensive Health Care Systems
M3 USA Corporation, et al.

30(b)(6) of WESTFAX, INC., BARRY CLARK
April 20, 2017

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1 testimony of Wex -- WestFax, Incorporated, 30(b)(6)
2 corporate designee Barry Clark. We are going off the
3 record. The time is 1:12.

4 WHEREUPON, the within proceedings were
5 concluded at the approximate hour of 1:12 p.m. on the
6 20th day of April, 2017.

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, DOREEN GIRDEEN, Registered Merit Reporter
and Notary Public, State of Colorado, do hereby certify
that previous to the commencement of the examination,
the said BARRY CLARK was duly sworn by me to testify to
the truth in relation to the matters in controversy
between the parties hereto; that the said deposition
was taken in machine shorthand by me at the time and
place aforesaid and was thereafter reduced to
typewritten form, consisting of 109 pages herein; that
the foregoing is a true transcript of the questions
asked, testimony given, and proceedings had. I further
certify that I am not employed by, related to, nor of
counsel for any of the parties herein, nor otherwise
interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my
signature and seal this 27th day of April, 2017.

My commission expires March 16, 2019

Doreen Girdeen

Doreen Girdeen
Registered Merit Reporter

